Supreme Court, U. S.
FILED
SEP 8 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-357

LINMARK ASSOCIATES, INC. and WILLIAM MELLMAN,
Petitioners,

v.

THE TOWNSHIP OF WILLINGBORO and GERALD DALY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JOHN P. HAUCH, JR.,
ARCHER, GREINER & READ,
A Professional Corporation,
One Centennial Square,
East Euclid Avenue,
Haddonfield, New Jersey. 08033
Counsel for Petitioners.

September 3, 1976.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
CITATION TO OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	8
APPENDIX A–(Opinion of Court of Appeals)	A1
APPENDIX B–(Opinion of the District Court)	B1
APPENDIX C–(Judgment)	C1
APPENDIX D–(Denial of Rehearing)	D1

CASE CITATIONS.

	Page
Barrick Realty, Inc. v. City of Gary, 491 F. 2d 161 (7 Cir. 1974)	7
Bigelow v. Virginia, 421 U. S. 809 (1975)	5, 7
Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U. S. 376, reh. den. 414 U. S. 881 (1973)	6, 7
Valentine v. Chrestensen, 316 U. S. 52 (1942)	5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

—

No.

—

LINMARK ASSOCIATES, INC. AND
WILLIAM MELLMAN,

Petitioners,

v.

THE TOWNSHIP OF WILLINGBORO AND
GERALD DALY,

Respondents.

—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, which denied rehearing on June 11, 1976.

CITATION TO OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A to this Petition) is reported at 535 F. 2d 786. The opinion of the District Court is unreported and is Appendix B to this Petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 28, 1976 (Appendix C hereto). A timely petition for rehearing was denied on June 11, 1976 (Appendix D hereto). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Does a municipal ordinance which prohibits any house "For Sale" sign on the premises deny prospective sellers and buyers the freedom of speech, equal protection of the law, and due process guaranteed by the First and Fourteenth Amendments?

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED.

Constitution of the United States, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

Constitution of the United States, Amendment XIV, § 1:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

By Ordinance No. 5, 1974 the respondent Township repealed Section 17-6.5 of its Sign Ordinance (Printed in full in the record filed herein at 14a-27a of Joint Appendix) which had permitted signs pertaining to the "sale of the premises on which they appear" in residential zones, thereby making it unlawful to erect or maintain any such sign.

STATEMENT OF THE CASE.

The Township of Willingboro by ordinance prohibited "For Sale" signs on residential premises and this action was brought to challenge the constitutionality of the ordinance.

The Township of Willingboro is a suburban New Jersey community with a total population of approximately 45,000. In 1970 the percentage of non-whites was .117 and increased by 1973 to .182. The ordinance prohibiting "For Sale" signs on homes was passed by the Township in 1974. This suit was brought to challenge the constitutionality of the ordinance.

In holding that the ordinance was unconstitutional, the District Court found (Appendix B hereto):

> ". . . it appears that the true thrust of these sign ordinances is to promote a racial balance or more properly, a racial imbalance in order to perpetuate existing racial lines.
>
> There can be no doubt that this is precisely the result desired by the Willingboro Town Council in adopting this ordinance. However, the key distinction between Willingboro and Gary, Indiana is that in Gary the stimulus and response were easily observable. As 'For Sale' signs appeared, whites disappeared from the city *en masse*. Yet in Willingboro, there exists no evidence of similar patterns. Rather, there is merely an indication that its residents are concerned that there may be a large influx of minority groups moving into the town with the resultant effect being a reduction in property value . . .
>
> • • •
>
> "In light of testimony . . . that approximately thirty percent of inquiries . . . are a result of 'For Sale' signs being posted on residences, it is ap-

> parent that the ordinance brings about a serious denial of a property owner's right to freely and reasonably express to others the desire to sell in violation of the First Amendment."

The District Court then found that a prospective buyer has only a limited "option" in choosing a home from those shown to him by a realtor and "[t]his fact along with the purported purpose of the ordinance—'stabilization of neighborhoods'—may have the ultimate effect of freezing in past discrimination, denying blacks a fair opportunity to find suitable housing" [citing *DeKalb Real Estate Board v. Chairmen and Board of Commissioners of Roads and Revenue for DeKalb County*, 372 F. Supp. 748 (N. D. Ga. 1973)].

The District Court further found "abundant evidence of potential interference with the right to travel," and that a potential buyer must seek out a realtor "no longer being able to merely assess a particular residential area in a community to ascertain for himself the homes which are available."

From witnesses for the Township came the following: A large realtor in the town said that after the ban on signs he was "still representing a straight about 80/20 minority to white seller buyer, both sides just maintaining a perfect balance, and we're actually very happy" (Jt. App. 160a). He didn't consider that "we've had a *panic* in Willingboro" (Jt. App. 163a). He was familiar with a town that prohibited signs and acknowledged that it had "not one" black family (Jt. App. 165a). The 80/20 ratio represents "stability" in the community (Jt. App. 170a). Willingboro historically is a transient community (Jt. App. 170a), but there has been no "mass movement of whites out of town replaced by blacks" (Jt. App. 171a). The mayor and a member of Council didn't indicate any "excess

of turnover of property in any way whatsoever" (Jt. App. 198a). "The number of turnovers was not out of line with national averages . . ." (Jt. App. 201a). But a member of Council said "the primary reason was stability" (Jt. App. 210a), while admitting that there was no "unstable position" (Jt. App. 213a). The prices of homes range from "the low middle twenties" to the "low fifties" (Jt. App. 215a). There was no racial crisis at the time the ordinance was considered (Jt. App. 237a).

The Court of Appeals for the Third Circuit, by a 2-1 decision reversing the District Court, upheld the constitutionality of the ban on "For Sale" signs. Rehearing was denied. The court's majority concluded in its opinion that the prohibition by ordinance of "For Sale" signs on homes was constitutional saying that "the prohibition of the use of residential signs as tools for proposing a commercial transaction, while leaving other and more widely used means available for such announcement, does not in our view rise to the level of an impermissible denial of the constitutional right of free speech or of the right to travel." (Appendix A hereto, p. 32).

The dissenting opinion stressed the fact that "censorship of the message" was the effect of the ordinance with the result that the majority's reliance on the *Valentine v. Chrestensen*, 316 U. S. 52 (1942) so-called "commercial speech" exception, was misplaced and this case should be controlled by *Bigelow v. Virginia*, 421 U. S. 809 (1975), protecting the advertising of lawful activity. (Appendix A hereto, pp. 51-54).

REASONS FOR GRANTING THE WRIT.

The Court of Appeals for the Third Circuit in this case has decided an important constitutional question in a way in conflict with the principles established by the decision of this Court in *Bigelow v. Virginia*, 421 U. S. 809 (1975). Fundamentally, this question and conflict involves whether or not freedom of speech protects the display of the message on a home that it is "For Sale." No question is raised as to the legality of the proposal to sell a home. No claim has been made that the proposed activity is in any way illegal. It should be noted that neither the majority nor the dissent in the Court of Appeals cites any evidence of "blockbusting" in the community.

The chief reliance by the majority below was on *Valentine v. Chrestensen*, 316 U. S. 52 (1942) which the majority attempted to interpret in the light of *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U. S. 376, reh. den. 414 U. S. 881 (1973). This reliance and interpretation, we submit, is incorrect. Even if *Chrestensen* has any vitality, the case must be narrowly limited. The traditional "For Sale" sign on a home is far from a commercial handbill advertisement. The *Pittsburgh Press* case is no support whatsoever for upholding the prohibition of advertising a house for sale which is a lawful activity. Neither unlawful activity nor an illegal message is involved in this case.

The justification found by the majority of the court below for upholding the prohibition of this legal activity was that the Township acted by ordinance to forestall the evils of segregation which were believed to be incipient, but admittedly not extant. The court's view was that to "force Willingboro to await the evils of segregation, which it has so successfully avoided to date, so that the principle of *Barrick* may thereafter be employed in an effort to fight

back, seems to us an approach devoid of common sense." The reference is to *Barrick Realty, Inc. v. City of Gary*, 491 F. 2d 161 (7th Cir. 1974) which was a case of mass exodus by whites which the instant case is not.

In the context of this case testing the government's power to severely limit free speech, it was the view of the majority below that: "Courts should hesitate to impede the success-preserving efforts of those few communities who have succeeded in achieving integration." (App. A., p. 24, footnote 19). We do not know of any authority supporting this view in a free speech context. In effect, the court below has found that it is a proper interest and function of government to stabilize the existing racial balance in a community and that freedom of speech must give way to such interest even where no unlawful activity is shown. We submit that this is a drastic departure from established law and contrary to the principles of *Bigelow* and *Pittsburgh Press*.

The court below completely ignored the First Amendment interest which is served by advertising on the spot so that sellers and buyers and, for that matter, the community, all can have the message out in the open without the aid or intervention of any third parties. The ban on this lawful activity is more than an incidental limitation on free speech. The decision of the court below sanctions a ban on the familiar method of advertising a house for sale in innumerable communities throughout the country. There is no doubt that this form of speech is widely used and relied upon by buyers and sellers alike.

The existence of this conflict in principle between the *Bigelow* decision of this Court and the court below warrants the grant of a writ of certiorari to resolve this important question involving lawful activity in the traditional form of an advertisement on the premises that a house is for sale. This First Amendment question is one of para-

mount importance which should be controlled by this Court's decisions. The volume of this type of advertising and its use by so many people is a silent but powerful reason to have the question raised by the decision of the court below reviewed at this time by this Court.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

JOHN P. HAUCH, JR.,
ARCHER, GREINER & READ,
One Centennial Square,
East Euclid Avenue,
Haddonfield, New Jersey. 08033
Counsel for Petitioners.

September 3, 1976.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1448

LINMARK ASSOCIATES, INC.
and WILLIAM MELLMAN,
Plaintiffs-Appellees,

v.

THE TOWNSHIP OF WILLINGBORO,
and GERALD DALY,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 74-1120)

Argued October 31, 1975

Before: GIBBONS, *Circuit Judge*, MARKEY,* *Chief Judge of Court of Customs and Patent Appeals* and WEIS, *Circuit Judge.*

KESSLER, TUTEK and GOTTLIEB
325 Farnsworth Avenue
Bordentown, New Jersey 08505
Attorneys for Appellants

JOHN P. HAUCH, JR.
ARCHER, GREINER & READ
One Centennial Square
East Euclid Avenue
Haddonfield, New Jersey 08033
Attorneys for Appellees

* Sitting by designation.

OPINION OF THE COURT

(Filed April 28, 1976)

MARKEY, *Chief Judge, Court of Customs and Patent Appeals.*

Linmark Associates, Inc. (Linmark), a New Jersey corporation of Camden, New Jersey and owner of residential premises at 25 Sherwood Drive, in the Township of Willingboro, New Jersey (Willingboro) and William Mellman (Mellman) of Mellman Realtors of Cinnaminson, New Jersey, Linmark's real estate broker, challenged the constitutionality of a Willingboro ordinance which barred the erection of "For Sale" and "Sold" signs on residential properties. The complaint charged the ordinance as unconstitutional because it deprives plaintiffs of their right of free speech under the First and Fourteenth Amendments, deprives plaintiffs of their property without due process of law in violation of the Fifth and Fourteenth Amendments, discriminates against plaintiffs and denies them due process and equal protection under the Fourteenth Amendment, denies plaintiffs their right to freely acquire and alienate property under the Ninth and Fourteenth Amendments, bears no relationship to public health, safety and welfare, is in derogation of the police power, is an abuse of its enabling legislation, denies Mellman his right to do lawful business in violation of the Ninth and Fourteenth Amendment and is overbroad. After a nonjury trial, the district court held the ordinance to be an abridgement of the First Amendment's free speech guarantee and an infringement on "the fundamental right to travel." Because we cannot find support in the record for the district court's legal conclusions, we reverse.

Historical Background

Residential development of Willingboro from the late 1950's is attributed chiefly to Levitt and Sons, Inc., which

built moderately priced homes for middle income families. Development, now virtually complete, proceeded through the "part system" whereby ten distinct areas (parts) were sequentially developed. In the early stages, Levitt refused to sell its houses to minority group members. The New Jersey Supreme Court enjoined that racially based housing discrimination. *Levitt and Sons, Inc. v. Division Against Discrimination in State Department of Education,* 31 N.J. 514, 158 A.2d 177, appeal dism., 363 U.S. 418, 80 S. Ct. 1257, 4 L. Ed.2d 1515 (1960).

Thereafter, a Human Relations Commission was formed and development of the community with full racial integration was actively encouraged. The Township joined National Neighbors, a nationwide organization promoting integrated housing and advising on what can be done to overcome discriminatory housing practices. As a result, a close approach was achieved to that housing ideal sought by fair-minded citizens, mandated by the federal Fair Housing Act, 42 USC § 3604, and impelled by our Constitution. Willingboro became a racially open community, with each of its ten "parts" having all racial and ethnic groups living together, with no section which could be denominated a white section, a black section, or a Spanish-speaking section. Between 1970 and 1973, the nonwhite population increased by 60% and had risen, without the formation of a racially segregated area or "ghetto," from about 12% to about 18% of the total population.[1] During those same years, within the total population of 45,000, there had been a decrease of about 2,000 in the white population and an increase of 3,000 in the nonwhite population.

1. The instance of stable, integrated racial patterns is rare. *Twenty Years After Brown—Equal Opportunity in Housing,* Report of the United States Commission on Civil Rights, Dec., 1975, p. 9. The success of Willingboro in achieving a continued integration pattern as its non-white population increased by 60% may be compared with the national experience wherein the black proportion of suburban populations has remained steady at 5% since 1950. *Id.* at 123. Racial segregation within central cities has been the norm and has been on the increase, while the number of black persons in mixed neighborhoods has declined. *Id.* at 124. When black persons have moved to suburban neighborhoods, those neighborhoods have frequently become black enclaves. *Id.* at 119.

Historically, the Willingboro population has been transient due to the nearness of military installations and the nature of the people's employment. Eighty-two realtors, members of the Multiple Listing Service of Burlington County (MLS), were competing in the sale of houses in Willingboro. These conditions, and the uniformity in home construction,[2] made it possible for a number of "For Sale" and "Sold" signs in a limited area to create the impression that many people were leaving the community. A fear psychology developed among home owners, which Council member and former Mayor W. J. Kearns, Jr. characterized in his trial testimony as follows:

> • • • I think that the concern that was generally expressed was that people in the community were expressing a desire to sell their homes and move to other areas of Burlington County because what they sensed was a lack of stability or a large turnover in the community, and that this large turnover was resulting in a substantial influx of minority groups into the community beyond what could be sustained without the community itself turning into a ghetto within the county.
>
> • • •
>
> I think most of us in the official level, and most of the citizens who were concerned about it that I talked to, felt that this was an irrational reaction on the part of many people, and that we were dealing with a psychological problem that we had to find some way to give people the feeling of stability so they would not overreact to a particular situation.
>
> I don't think anyone was concerned with people of minority groups moving into the community or reaching a 20 percent, or even somewhere in the range of 20 to 25 percent minority grouping. They felt this

2. Typical Willingboro dwellings were built in a line, the same distance from the street, and constructed on lots having 60-70 foot street frontage.

> was properly a generally [sic] average throughout the Delaware Valley area.
>
> But they did feel that if we had a situation where white home owners in the community were moving, not because they were transferred or not to move to a larger home or a smaller home, for other economic reasons, but were moving because what they sensed was the reaction of the community, but that we would wind up with Willingboro hitting beyond the point of minority group population that would turn it into an isolated pocket of minority groups in Burlington County. It would no longer reflect an integrated community, but would become a ghetto.

Concern for the preservation of the well-integrated character of the community and the desire to counteract the growing fear psychology produced a public sentiment against "For Sale" and "Sold" signs on residential property. Responding to that sentiment, the township council investigated the approach of other cities. At the trial, Mayor Kearn stated the results of the investigation into Shaker Heights, Ohio's, experience to have been:

> They indicated that at the outset there was a strong hostility to their ordinance on the part of the realtors. But that after having worked with it for a year, to a year and a half, that they found they have good compliance, and that it was working very successfully.

The Township council consulted the Willingboro Human Relations Commission for its views and recommendations. The response was described at the trial by Mrs. Gladfelter, a founder-member of the Commission and its chairperson in 1973-74:

> Yes, I think we specifically were recommending at this time that council move to consider an ordinance or any other possible way to prohibit sale and sold signs throughout the township.

The concern of the Commission was described at the trial by Commission member Alexander W. Porter as follows:

> I think the Commission would like to see a community which is as harmonious as it would choose to be without the kind of pressures, if I may use that term, which would induce people to sell when in fact they don't want to sell; and I think that's the thing that the ordinance was directed at.
>
> Individuals were responding and reacting to a rash of signs, or, one sign which would lead to another, and another and another.
>
> I think that's the concern the Commission was trying to address.

Public concern with the effect of "For Sale" and "Sold" signs had become widespread in 1972 and became an issue in the 1973 elections to membership on the Township Council. The Council's normal policy was to hold one public meeting after an ordinance had been drafted and before its adoption. With respect to the signs, however, after two years of public ferment, the Council conducted two public hearings, one before (February 4, 1974) and one after (March 18, 1974) the drafting of the ordinance herein. More than 50 citizens presented their views during the more than four hours devoted exclusively to the question of the signs on residential property. Complaints were stated regarding phone calls, letters and house-to-house solicitations by realtors inquiring whether the homeowner wished to sell;[3] about panic selling; about "Sold" signs remaining up for six weeks in violation of an

3. The effect of signs and solicitation to sell, the subtleties employed by marauding blockbusters and the difficulty of stemming their actions before the "tipping" point is reached—after which the process is irreversible—are all described in Note, "Blockbusting," 59 *Geo. L.J.* 170 (1970). See, also, Comment, "Blockbusting: Judicial and Legislative Response to Real Estate Dealers' Excesses," 22 De Paul L. Rev. 818 (1973); "Blockbusting: A Novel Statutory Approach to an Increasingly Serious Problem," 7 Colum. J.L. & Soc. Prob. 538 (1971); State court decisions are collected in Comment, "The Constitutionality of a Municipal Ordinance Prohibiting 'For Sale,' 'Sold,' or 'Open' Signs to Prevent Blockbusting," 14 St. L.M. L.J. 686 (1970).

ordinance requiring their removal in five days (in response to which Council members cited the great difficulty of enforcement); about the "forest" of signs, which created the impression that "there was something wrong with the community," and consequent departure of persons who might otherwise have remained. Realtors and representatives of real estate brokers were the main spokesmen against the ordinance, describing the signs as "tools" needed in their business. Some realtors injected race questions in their arguments against the ordinance. One realtor questioned whether the council had funds to defend the ordinance in litigation.

At the end of the second public hearing, the ordinance, which took the form of an amendment to a prior ordinance and prohibited posting of "For Sale" and "Sold" signs on residential property other than model homes, was adopted unanimously by the Township Council, Mayor Kalik abstaining because she considered her status as a realtor raised a conflict of interest. The minutes of both public hearings, plus those of the Council meeting which adopted the ordinance and at which the Council members explained the reasons for their vote, were transcribed and made an exhibit (P-3) at the trial.[4]

Proceedings Below

Suit was filed four months after the ordinance was adopted. One witness, Mellman, testified on plaintiff's

4. Exhibit P-3 was initially submitted by the Township in connection with a motion. At trial opening, plaintiffs' counsel stated:

> "I think these would be offered in the nature of a joint exhibit. It's agreed that they do accurately reflect what was said at the meetings on the subject. However, the truthfulness of the statements is not admitted, but the fact that they were made is."

The dissent would appear to rest substantially on acceptance of the truth of selected statements made at the public hearings. The same is true of the decision below.

Of course, Exhibit P-3 can stand only for the fact that the statements, mostly argumentative and none subject to cross-examination, were made. Except for three minor references, Exhibit P-3 was ignored at the two day trial herein.

As said in *Construction Industry Ass'n., Sonoma City v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975) we are not a "super legislature" and are not authorized to "weigh and reappraise the factors considered or ignored by the legislative body."

side. His direct testimony consisted only in the statement that the nonavailability of a sign slowed the sale of the residential property of co-plaintiff Linmark Associates, Inc.; that he had had complaints from Linmark, as well as from other (unnamed) homeowners, regarding slowness in furnishing buyers and saying, "Why don't you put a sign up?"; and that an average of 30% of his inquiries had resulted from signs over many years. Mellman did not state that the ordinance caused him any actual or specific loss of sales or commissions. After the cross-examination of Mellman, plaintiff rested. Defendant moved for dismissal for failure of plaintiffs to carry their burden. Decision was reserved, but the motion was never again mentioned, perhaps because defendant had indicated, prior to its motion, that plaintiffs' counsel intended to rely on "evidentiary proofs presented by defense."

Defendant presented seven witnesses, Councilmen Kearns and Heath, Human Relations Commission members Gladfelter and Porter, Human Relations Commission Chairman Rev. Ernest Shaw Lyght, and real estate agents Evans and Connolly.

Because of its laudable brevity and its relation to an understanding of our decision herein, the opinion of the district court is presented in the margin.[5]

5. After describing the parties, the ordinance, the town, and the positions of the parties, the remainder of the opinion of the district court herein in its entirety reads:

> An ordinance of the city of Gary, Indiana which prohibited the display of "For Sale", "Sold", or similar signs in residential areas was upheld as reasonable where it was clearly apparent that the proliferation of the "For Sale" signs resulted in a tendency to provoke panic selling. *Barrick Realty, Inc. v. City of Gary, Indiana,* 354 F. Supp. 126 (N.D. Ind. 1973), *affirmed* 491 F.2d 161 (7th Cir. 1974).

The Court stated:

> "The potential public benefit from the ordinance far outweighs the harm to realtors and homeowners who wish to use 'For Sale' signs. The additional expense or delay which might result from having to use alternative means of advertising is minimal." 354 F. Supp. at 136.

Thus, an ordinance similar to the one in question here has been held to be a reasonable exercise of the police power. However, the history of the Gary ordinance shows that its purpose was to halt resegregation.

> "It was passed in response to the presence of numerous 'For Sale' signs in some white neighborhoods, which caused whites to move *en masse* and

Issues

We are called upon to decide whether the district court erred in striking down the ordinance as (1) violative of

5. (Cont'd.)

> blacks to replace them. There is evidence in the record that some real estate brokers who placed these signs (not including any plaintiffs) actively encouraged resegregation by unlawfully urging whites to sell quickly before they had black neighbors and lower property values." 491 F.2d at 163.

With due deference to the reasoning of the *Barrick* court, on the facts before the court there, it appears that the true thrust of these sign ordinances is to promote a racial balance or more properly, a racial imbalance in order to perpetuate existing racial lines.

There can be no doubt that this is precisely the result desired by the Willingboro Town Council in adopting this ordinance. However, the key distinction between Willingboro and Gary, Indiana is that in Gary the stimulus and response were easily observable. As "For Sale" signs appeared, whites disappeared from the city *en masse*. Yet in Willingboro, there exists no evidence of similar patterns. Rather, there is merely an indication that its residents are concerned that there may be a large influx of minority groups moving in to the town with the resultant effect being a reduction in property values. This fear of declining property values, however, although very real to property owners in Willingboro, is not and cannot be the concern of this court when it results in an abridgement of constitutional rights.

In spite of its decision, the Seventh Circuit in *Barrick* recognized that "the very purpose of the ordinance is censorial. First Amendment as well as commercial interests are therefore affected by this ordinance." 491 F.2d 161 at 164.

The Supreme Court has held that reasonable regulations upon commercial communications do not fall within the purview of the First Amendment. *Valentine v. Chrestensen,* 316 U.S. 52 (1942). The situation, however, with which the court is presented here results in nothing less than censorship by denying property owners of a very important means by which they may communicate to others that their property is for sale. In light of testimony from plaintiff Mellman that approximately thirty percent of inquiries to his office are a result of "For Sale" signs being posted on residences, it is apparent that the ordinance brings about a serious denial of a property owners right to freely and reasonably express to others the desire to sell in violation of the First Amendment.

Even more important is the concomitant result: one who wishes to purchase a home in Willingboro has no way of learning what is available. He only has the "option" of choosing a home from those which he is shown by a realtor, thereby necessitating the use of a real estate brokerage firm. Further, the broker or salesman may be very selective in choosing which home he wishes to show a potential buyer. This fact along with the purported "purpose of the ordinance—'stabilization of neighborhoods'—may have the ultimate effect of freezing in past discrimination, denying blacks a fair opportunity to find suitable housing." *DeKalb Real Estate Board, supra.*

Thus, this circumstance leads to the natural conclusion that in its application the Willingboro ordinance results in an infringement upon the fundamental right to travel, *Shapiro v. Thompson,* 394 U.S. 618 (1969), a right which may not be abridged absent a compelling State interest. *Wellford v. Battaglia,* 343 F. Supp. 143 (D. Del. 1972), *affirmed* 485 F.2d 1151 (3d Cir. 1973). Travel, in this sense, refers to migration with intent to settle and abide, not mere movement. *Wellfold, supra,* 343 F. Supp. 143, 147 n.9.

Yet in view of the opportunity that realtors in Willingboro have to utilize the ordinance to arbitrarily regulate the racial and ethnic development of a

the First Amendment guarantee of free speech, and (2) as an infringement of the right to travel.

Burden of Proof

Acts of legislative bodies, state and municipal, are presumed to be in harmony with the Constitution. See *Erb v. Morasch,* 177 U.S. 584, 20 S. Ct. 819, 44 L. Ed. 897 (1900). The present ordinance on its face constitutes some limitation on the right of free speech. In view of the "privileged position" of the First Amendment, therefore, we must review the nature of the message censored, the purpose and effect of the ordinance, and its relation to the public welfare as an exercise of the police power.

To defeat the ordinance on due process grounds under other constitutional provisions, however, Linmark and Mellman must establish, at least prima facie, that the ordinance is so unreasonable and arbitrary as to amount to an impermissible infringement on constitutional guar-

5. (Cont'd.)
particular residential area, there is abundant evidence of potential interference with the right to travel, a right which applies to intrastate as well as interstate migration. Id. at 147.

Although municipal ordinances are clothed with a presumption of validity, *Roe v. Kervick,* 42 N.J. 191 (1964), the exercise of a municipality's police power in enacting an ordinance must be through reasonable means substantially connected with the public interest designed to be advanced *Moyant v. Paramus,* 30 N.J. 528 (1959).

Although this court does not doubt that Willingboro adopted its ordinance for what the Town Council felt was a valid purpose, legitimate legislative goals cannot be pursued by means which broadly stifle fundamental liberty when the end can be more narrowly achieved. *Shelton v. Tucker,* 364 U.S. 479 (1960).

The goal here of alleviating problems of panic selling is meritorious. However, the means employed are not. Therefore, the ordinance must not be allowed to stand when as applied, it enables a realtor, a private citizen, to be the only one capable of apprising a potential buyer of the status of the real estate market. It is he alone who is aware of those homes which are listed for sale. The buyer is forced to seek him out, no longer being able to merely assess a particular residential area in a community to ascertain for himself the homes which are available. What follows is to place each purchaser at the whim of the realtor, enabling him, if he so desires, to stimulate and prey on racial bigotry and fear to create or perpetuate ghettos.

Such a result, accomplished through the action of a municipal governing body, cannot be tolerated. This court, following a full hearing, therefore determines Ordinance No. 5-1974 of Willingboro Revised General Ordinances to be unconstitutional.

Plaintiff will submit an appropriate order.

Dated: February 20th, 1975

antees. *Goldblatt v. Hempstead,* 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed.2d 130 (1960); *New Orleans Public Service, Inc. v. New Orleans,* 281 U.S. 682, 50 S. Ct. 449, 74 L. Ed. 1115 (1930).

This action was brought by two business-oriented plaintiffs, whose interest in Willingboro lies in the profit to be derived from sales of real property in the community.[6] Linmark desired a faster sale of 25 Sherwood Drive. Mellman's sales commissions are earned only by turnovers in property ownership. Municipalities have a bona fide interest in regulation of commercial activities in residential areas. That community interest may, in a proper case, prevail over a claim of economic loss. *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). The plaintiff's case in chief involved a single witness, the realtor Mellman, whose limited testimony on direct is described above. Cross-examination of Willingboro's witnesses did not satisfy the burden of proof on the due process issue or even of economic loss.[7]

Accordingly, the district court elected to rest its decision on free speech and right to travel considerations, con-

6. No witness testified against the ordinance on racial discrimination grounds. On the contrary, the testimony showed the support of the ordinance on the part of a number of organizations devoted to the civil rights of black citizens. The district court accepted Councilman Heath's statement that the N.A.A.C.P. was "among the strongest proponents" of the ordinance.

That plaintiffs do not claim to be the victims of racial discrimination would not, of itself, save the ordinance, if it had been shown to have the purpose or effect of racial discrimination.

7. That the absence of signs results in economic loss was left by plaintiffs to inference. In cross-examination, plaintiff's counsel established that the same number of houses were being *sold* (and thus that the same commissions were being earned). He then brought out the increase in the particular volume of defendant's two realtor witnesses, implying an undercurrent of in-town realtors vs. out-of-town realtors. Evans had earlier stated that "community assessment" expressed to him by homesellers included a belief by the homesellers that non-MLS realtors from out of town were bringing in minority groups. But there was no evidence that out-of-town realtors had lost any sales. The increases of Evans and Connolly could have equally implied a decrease by other in-town realtors among the 80 other members of the MLS. Evans "believed" most of his increase came from "March Realty," which was not otherwise identified at trial. Moreover, plaintiff Mellman was himself a member of the Multiple Listing Service operating in Willingboro and had worked together with defendant's witness Evans, who described Mellman, without contradiction, as "one of the prime movers of my properties."

cluding that the purpose of the ordinance was to maintain a racial imbalance and citing a suspicion that realtors might discriminate as support for its conclusions with respect to both free speech and the right to travel.

Review of the district court's conclusions does not require resolution of witness credibility or of conflicting factual testimony at the trial. We have, of course, considered the entire record in relation to the purpose of the council in adopting the ordinance, and in relation to the effect of the ordinance. Similarly, though the right to travel was never mentioned at trial or in the briefs below, and though plaintiffs had no standing to raise that third-party interest, *Warth v. Seldin,* 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed.2d 343 (1975); *Construction Ind. Ass'n., Sonoma Co. v. City of Petaluma, supra,* note 4, at 903, we have considered that question as well. As discussed more fully below, we cannot find wherein the record supports the district court's conclusions concerning the constitutionality of the ordinance.

Free Speech

Every anti-sign ordinance infringes to some extent upon some form of speech or type of message. If the ordinance herein had impeded "pure speech" its demise would have been certain. There is, however, a well recognized distinction between commercial advertisement and the advertisement of opinion, information and ideas. See *United States v. Hunter,* 459 F.2d 205 (4th Cir.), *cert. denied,* 409 U.S. 934 (1972), *reh. denied* 413 U.S. 923 (1973), and authorities collected therein. If, as seems clear, the present ordinance impeded speech primarily commercial, and the noncommercial portion of the message does not comprise comment on or protest of political or social policies or like elements of pure speech, the ordinance may be sustained by the public interest it serves.

Though signs in general convey a message or a thought, they do not always consist solely of "pure

speech." A "For Sale" sign on a residence states the owner's and the realtor's commercial desire to sell that residence. A "Sold" sign states the commercial fact that the residence has been sold. The present signs thus incorporate a substantial "nonspeech" element. In *United States v. O'Brien,* 391 U.S. 367, 376, 88 S. Ct. 1673, 1678, 20 L. Ed. 672 (1968), the Chief Justice stated:

> This court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

The present ordinance does not attempt to dictate or regulate the content of permitted signs, it forbids particular signs altogether in a particular area, i.e., it limits the location of the involved signs, leaving other means available for conveyance of their content.[8] Our scrutiny, nonetheless, impels consideration of whatever message may reside in the signs. Though the message of the signs before us is primarily a commercial message, it is clear that a "For Sale" sign necessarily includes an additional message, i.e., "The owner is leaving this residence," and a "Sold" sign includes the message, "The owner has left this residence." We are unable to detect, and nothing in the record speaks of,[9] any other possible message in "For Sale" and "Sold" signs on residential property. As appears hereinbelow, we consider the limitation on the manner whereby and the place wherein both messages may be conveyed to have been based on a paramount governmental public interest, to wit the termination of a panic selling psychology and its impetus to housing segregation. Stated

8. In *Terminal-Hudson Electronics of Calif. v. Dept. of Consumer Affairs,* 44 LW 2337, a three-judge court (D.C. C. Calif.) struck down a code provision prohibiting all advertising of the cost of commodities and services of optometrists, because the provision permitted no other means by which comparative price information could be obtained.

9. There was no testimony below, and no exhibit, relating to the nature of the message being censored by the ordinance herein.

another way, we conclude that the manner and place limitation on commercial speech herein served a legitimate public welfare interest and the incidental manner and place limitation on noncommercial speech falls upon an unspoken or invisible "message" or communication of a nature insufficient to override that public interest on First Amendment grounds.

That a communication is commercial in nature does not *ipso facto* strip the communication of its First Amendment protections.[10] There is no "exception" which exempts a limitation on commercial communications, or "advertising," from constitutional scrutiny. That a communication is commercial does, however, permit municipalities to weigh the impact on the general public of the manner in which the communication is made. And if that impact be found detrimental, and the limitation on any pure speech element be found minimal, the manner in which communication is made may be regulated. *Valentine v. Chrestensen,* 316 U.S. 52 (1942).

Chrestensen was characterized in *Bigelow v. Virginia,* 421 U.S. 809, 95 S. Ct. 2222, 2231, 44 L. Ed. 600, 610 (1975), as follows:

> But the holding [in Chrestensen] is distinctly a limited one: *the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed.* The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition

10. Although one author may consider the exaltation of momentary, sterile, commercial exchange transactions, by equating them to the majestic status of the First Amendment, to be unwise: "Those who constantly press the Supreme Court to stand up and face every issue squarely may have lost sight of the utility of softening our edges to keep them from cutting us apart." Karst, *Community and Law,* Law and the American Future, American Assembly, 1976.

> that advertising is unprotected *per se.* [Emphasis added and footnote omitted].

The advertisement banned by the state in *Bigelow* appeared in a Virginia newspaper and was for abortion services in New York. The court noted that Virginia could neither regulate the advertiser's legal services in New York nor prevent Virginians from traveling to New York to avail themselves of those services. Because the Virginia courts were found to have erred in their assumption that *no* First Amendment protection attaches to advertising, the Supreme Court found it unnecessary to decide the precise extent to which advertising may be regulated. The court then commented:

> Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations.*

In *Pittsburgh Press,* 413 U.S. 376, 93 S. Ct. 2553, 37 L. Ed.2d 669, *reh. den.* 414 U.S. 881, 94 S. Ct. 30, 38 L. Ed.2d 128 (1973), a city ordinance forbidding sex classification in newspaper employment advertising was held not to infringe First Amendment rights. Although the dissenting opinions in *Pittsburgh Press* were critical of *Chrestensen,* the majority relied on that opinion and compared it with *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed.2d 686 (1964), as follows:

> The critical feature of the advertisement in *Valentine v. Chrestensen* was that, in the Court's view, it did no more than propose a commercial transaction, the sale of admission to a submarine. In *New York Times Co. v. Sullivan,* Mr. Justice Brennan, for the Court, found the *Chrestensen* advertisement easily distinguishable:

> The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. 376 U.S., at 266.

In the crucial respects, the advertisements in the present record resemble the *Chrestensen* rather than the *Sullivan* advertisement. None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.

So here, in all crucial respects, the "For Sale" and "Sold" signs in themselves resemble *Chrestensen* rather than *Sullivan* subject matter. The visible message of a "For Sale" sign is a proposal of a commercial transaction, the sale of a residence. The visible message of a "Sold" sign is an advertisement that a sale transaction has been completed.[11] Neither, in itself, contains comment on social policy, grievances, abuses, criticisms, or the like.[12]

Though the speech herein be primarily commercial, our duty remains one of balancing the governmental interest involved against the precise limitation imposed. As expressed by the Supreme Court in *Bigelow:*

> a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.

11. To prohibit only "Sold" signs could result in the conveyance of an impression that houses were on sale but could not be sold.

12. We consider, *post*, the "invisible" message, i.e., that people are leaving.

The preservation of a desirable community impels a priority of the community's needs over the needs of those who would conduct commercial transactions in the community as they see fit, so long as those community needs are reasonably established and the means chosen to meet them do not infringe upon the fundamental constitutional rights of individual businessmen. That the present ordinance denies homeowner-sellers and realtors the freedom to continue the use of a particular sales tool is clear, but not fatal. Nor is it new. Constitutionally affirmed laws abound that limit business practices. Nor does the record support the district court's characterization of the denial as "serious." It's effect on plaintiffs is, at most, to slow the pace of sales on the 30% of inquiries received from signs to that of the other 70% received from other sources. Newspaper ads, in-town window displays or other possible means of conveying the desire to sell remain fully available to all. Houses will still be sold, though perhaps not as quickly. Most importantly, fewer may be sold solely because the seller had a fear of minorities. We consider the limited denial occasioned by the ordinance herein to result from a reasonable exercise of the police power in furthering the public welfare by forestalling panic selling and its offspring, segregation.

Linmark and Mellman argue that the governmental interest herein is inadequate. We are persuaded, however, that the concept of the public welfare is of sufficient breadth to uphold the Township's interest in protecting its stable, racially integrated neighborhoods from the destructive segregating effect of a panic selling psychology, and that that Township interest is sufficient to justify a prohibition of "For Sale" and "Sold" signs, the physical embodiments of plaintiffs' commercial speech, on residential property.[13]

13. There was testimony that the signs herein were unsightly. Aesthetics are governmental interests which have supported limitations on full-force application of the First Amendment to outdoor commercial advertising, *St. Louis Poster Advertising Co. v. St. Louis*, 249 U.S. 269, 39 S. Ct. 274, 63 L. Ed. 599

Purpose of the Ordinance

Nothing in the record indicates that the thrust of the present ordinance was the maintenance of a racial balance or imbalance, or that such was the desire of the Council. And nothing of record indicates that "preserving stability" is equatable herein to "racial discrimination" or to the maintenance of a given numerical ratio of white to nonwhite persons in the community. Only by refusing to sell to a minority buyer anywhere in Willingboro, could any set population ratio of Willingboro be maintained. "Stability" herein, as the record shows, means diminution of the number of neighbors leaving on the basis of fear alone. See *Brown v. State Realty Co.*, 304 F. Supp. 1236, 1238 (N.D. Ga. 1969). Obviously, the absence of signs could not itself control who moves in.[14]

That the purpose of the ordinance and of the Council was to nip panic selling in the bud, and not to preserve any

13. (Cont'd.)
(1919); *United Advertising Corp. v. Borough of Raritan*, 11 N.J. 144, 93 A.2d 362 (1952). There was also testimony establishing the difficulty of controlling "Sold" signs. It is clear, however, that the primary public interest sought to be served herein was the forestalling of panic selling and its attendant evils.

14. Though the present ordinance was not designed to achieve racial balance, there is substantial indication that such general purpose would support, rather than destroy, the ordinance. The thrust in site selection for subsidized housing for low income groups is *racially balanced* tenancy. See, *Fair Housing and Exclusionary Land Use*, Report of National Commission Against Discrimination in Housing and Urban Land Institute (1974), cited in *Twenty Years After Brown*, supra, note 1, p. 94. In *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2nd Cir. 1973), it was held that the housing authority's duty to *racially balance* housing took precedence. In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed.2d 797 (1974), the Supreme Court, citing *Berman v. Parker*, 348 U.S. 26, said:

> It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

See also, *Oakwood at Madison, Inc. v. Madison*, 117 N.J. Super. 11, 283 A.2d 353 (1971), in which the court invalidated a zoning ordinance that failed to promote a reasonably balanced community in accordance with the general welfare.

The difficulties of social engineering, in governmental efforts to achieve racial harmony, and the agonizing conflict between the desire for integrated communities and the concommitant necessity of denying residence to a minority in a particular area beyond a planned number in designing such a community, are described in Frederick, "The Legality of Affirmative Measures to Achieve and Maintain Integration in a New Town," 59 *Geo. L.J.* 335 (1970).

particular numerical racial balance, was undisputed and was illuminated at the trial by every witness to whom the question was put.[15] For example, the Chairman of the Commission, the Rev. Ernest S. Lyght, after stating that there was currently no overt racial conflict but that underlying racial conflicts remained, was asked:

> Q. So that the enactment of the ordinance prohibiting for sale signs didn't entirely solve the problem; is that what you are saying?
>
> A. No. And there was no intent on the part of the Commission in making such a recommendation. There was no thought that this was going to somehow solve all racial problems. But it was felt that this was one approach, one aspect of dealing with overall problems, specifically to deal with this matter of creating panic selling, which we have clearly realized could cause a change, see, in the racial balance of the community.
>
> THE COURT: Do you concern yourselves with such things as balance; and do you mean, for instance, an 80/20 ratio is necessarily a balance?
>
> THE WITNESS: No concern with ratios, absolutely none. Simply the openness and ability to live in the community and anywhere in the community one chooses. No concern with ratios.
>
> BY MR. GOTTLIEB:
>
> Q. So when you use the term "balance," it doesn't have a numerical connotation?

15. No part of Evans' testimony established a discriminatory desire in him. Nor could his personal views be attributed to the Township Council. The full testimony of Evans establishes that his reference to "80/20" involved only *his own sales*, which had not changed in the short four months since passage of the ordinance, and that he "had no way of guessing" what the "overall percentage of minority groups in Willingboro" was. Evan's view that an 80/20 ratio represents "stability," even if that view were somehow evil (in the absence of acts to maintain any set ratio) would not be binding on the Council or constitute evidence of the *Council's* purpose in enacting the ordinance. Evans was not on the Council and did not make policy for Willingboro. Plaintiffs' counsel objected, properly, to Evans' answering a question as to whether "conditions in the community [were] sufficient to warrant the ordinance."

A. No, and probably I shouldn't say balance, but should say complete, total openness.

Q. Is it your impression that the enactment of the ordinance prohibiting for sale signs has in any way caused a lessening or a decrease in the areas of racial or ethnic conflict in the township?

A. I think my specific response would have to be that it's fairly clear to me that the prohibition has stopped or brought to an end the kind of things that we used to hear of, people talking about the rapid change in the community, whether it was in fact or assumed.

Commission member A. W. Porter similarly testified:

If the neighborhood was or is to be all black, and if that is a decision by choice, choice of the individuals involved, then the Commission I believe would have no concerns about that. But if neighbors, residents of the township are being pushed into this kind of thing by the presence of a sign or signs, then I think the Commission's concern would be that that ought not to be, this is not the free choice that people ought to exercise, should exercise.

Councilman Kearns testified:

Q. Now, you said that you, as a councilman and former mayor, were not concerned with minority groups in the community reaching a level of perhaps 20 to 25 percent of the total population; correct?

A. That's correct.

• • •

Q. In your discussion in council, was it ever your feeling that council was utilizing this ordinance to restrict minority groups from moving into town?

A. Absolutely not.

Q. Blacks, Spanish persons, what-have-you?

A. Absolutely not. We were trying to prevent the emotional reaction on the part of sellers. It was in no way related to people moving into the community.

Councilman Keath:

Q. Now, I understand that the percentage of minorities in the community, however, had been increased; is that correct?

A. That's correct.

Q. But your township exhibit shows that it's eighteen percent now; and to you, does that represent an unstable condition or a stable condition?

A. I don't think it's sufficient information to pass a judgment as to stability or instability. You know, simply—the simple figures.

Q. Does it cause you great concern?

A. Does it cause me concern?

Q. Yes.

A. Personally because there are blacks in Willingboro, no. Would it cause me concern that I felt that large number of people were panic-selling? Yes. P: they black or white, and be blacks or whites moving in.

• • •

A. Do I think that simply have [sic] the 18.2 percent of our people black presents an unstable position?

Q. Yes.

A. No.

Q. Is there anything on that chart that you think represents an unstable condition or an imbalance of what you think the population ratio should be in Willingboro?

A. I think they are two different questions. If I could answer one, there is nothing on here that causes me to think, looking at the statistics, that it's unstable. In answer to question number one.

In answer to question number two, I have no preconceived notion as to what the percentages of people ought to be.

The public interest that lies in avoidance of the psychological climate leading to panic selling, and its resultant impetus to housing segregation, was, as the district court herein recognized, referred to by the court in *Barrick Realty, Inc. v. City of Gary, Indiana,* 491 F.2d 161 (7th Cir. 1974) in these terms:

> The history of the ordinance banning "For Sale" signs shows that it was aimed at panic selling and that its purpose was to halt resegregation. It was passed in response to the presence of numerous "For Sale" signs in some white neighborhoods, which caused whites to move *en masse* and blacks to replace them. There is evidence in the record that some real estate brokers who placed these signs (not including any plaintiffs) actively encouraged resegregation by unlawfully urging whites to sell quickly before they had black neighbors and lower property values. Plaintiffs' signs proposed a commercial transaction that is part of a pattern of transactions, all of which taken together lead to a result that the City of Gary can properly try to prevent. 491 F.2d at 163-64.

As above indicated, the Township Council did not act rapidly or capriciously or arbitrarily herein. It waited two years to act. It investigated. It consulted. It held two public meetings. It exercised its unanimous judgment, in carrying out its prescribed duty, on the basis of its experience with the panic-selling threat to the community. That the full results of the panic-selling here sought to be terminated were incipient, rather than extant as in *Barrick,* cannot be controlling.

The district court found that Willingboro's goal "of alleviating problems of panic-selling is meritorious," but

distinguished *Barrick* on the basis that the evil results of panic-selling (reduction in property values, segregation, and ghetto [16] establishment) had not yet happened in Willingboro. Plaintiff's counsel made the same argument before us admitting, however, that the *Barrick* result would be correct if those evil results had been proven to have occurred. But to forbid termination of a cause of panic-selling until its detrimental effects have burdened the community would be an exaltation of form over substance. That approach would bar combating at its inception the very problem now plaguing so many urban areas where measures such as "busing" are now found necessary.[17] To force Willingboro to await the evils of segregation, which it has so successfully avoided to date, so that the principle of *Barrick* may thereafter be employed in an effort to fight back, seems to us an approach devoid of common sense.

Thus an ordinance prohibiting "For Sale" and "Sold" signs in residential neighborhoods was found constitutionally acceptable in *Barrick* as a reasonable means to halt rampant panic-selling and its resegregation effects. No reason appears of record to indicate that the same

---

16. The district court apparently defined "ghetto" as an area of low property values and deterioration caused by its inhabitants, rather than as simply an area of minority concentration:

> THE COURT: Low price of houses in the low twenties?
>
> THE WITNESS: Yes.
>
> THE COURT: Why would you think that people who could afford that would make a ghetto out of a town?
>
> THE WITNESS: I don't. I never thought anybody would make a ghetto out of a town.
>
> THE COURT: It must have been a previous witness.
>
> * * *
>
> THE COURT: As a lawyer, would you be concerned about someone paying—and it's been the testimony here—that the least expensive house sold along the line, or at least that I heard of, was in the low $20,000 range.
>
> Do you feel that someone paying that much for a house would want to turn this neighborhood into a ghetto?

17. That circumscribed neighborhoods peopled by minorities subvert the effort to desegregate public schools is set forth in *Twenty Years after Brown,* supra, note 1, p. 107 and p. 178. See, also, *Milliken v. Bradley,* 418 U.S. 717, at 724 (1974).

ordinance [18] is not even more constitutionally acceptable as a reasonable means to halt early panic-selling and its incipient segregation effects. The federal Fair Housing Act prohibits the mere *attempt* to encourage "white flight." 42 USC 3604(e). See *Brown v. State Realty Co.*, supra. The ordinance herein being preventive in nature and constitutionally permissible, the present case fits the adage, "an ounce of prevention is worth a pound of cure."

Nor is it critical that the court in *Barrick*, was concerned with panic-selling in "white neighborhoods." Whether the neighborhood is "white" as in *Barrick*, or fully integrated, as here, the final effect of panic-selling is the same, i.e., acceleration of a movement toward segregated housing patterns. If anything, avoidance of panic-selling may have even greater significance in a neighborhood which, like those before us, has achieved integration, the avoidance being designed to preserve that desirable condition.[19]

That the ordinance herein specifically permitted signs on model homes, where no "invisible" message was possible, further confirms the fact that the ordinance was directed against the invisible message of the signs, i.e., that people were leaving. We agree with the district court that homeowners should not assume that having black neighbors will always result in lower property values.[20] Until

18. The ordinance in *DeKalb Real Estate Board v. Chairman and Board of Commissioners of Roads and Revenue for DeKalb County*, 372 F. Supp. 748 (N.D. Ga. 1973) cited by the district court herein, was entirely different from that before us and, of course, there was no "discrimination" to "freeze in" in Willingboro in 1974.

19. The Federal Government, by attacking zoning and other land use powers employed to prevent low income housing in suburbia, in an effort to prevent segregation in site and tenant selection, see *Twenty Years After Brown*, supra, note 1, pp. 100-108, devotes yeoman effort toward achieving what Willingboro already has. Courts should hesitate to impede the success-preserving efforts of those few communities who have succeeded in achieving integration.

20. The following transpired at trial:

A. When the first three homes that were sold changed hands from white families to black families, many white families in the neighborhood began to say that they were very worried and to express concern that all of the other homes that were then for sale would also go from white to

that day comes, as come it must, when such reprehensible lumping of groups of people within broad generalities has ceased, however, the phenomenon known as "white flight" must be, and is being, dealt with. As above indicated, its existence is recognized, and its encouragement is made unlawful, in the federal Fair Housing Act, 42 USC 3604.[21]

The Township Council recognized and attempted to deal with the same problem in adopting the ordinance before us. To slow an artificial, fear-accelerated pace of racial change is not to seek a specific population ratio and is not itself a form of racial discrimination. When a fact of human experience, such as panic-selling, is recognized and acted against by those on the firing line in the community, we the more cloistered should not interpose our conjectures regarding motive to stifle such action, in the absence of clear evidence of violation of fundamental constitutional rights.

The district court erred in attributing to the Council the unworthy views of those homeowners who would flee in

20. (Cont'd.)

black, and that the neighborhood will be changed entirely. They'd be left to desegregate the ghetto.

There was a lot of fear, and I invested a lot of time at that point trying to talk to people about not rushing to put their home on the market and move to another community just because some people were transferred in their jobs or by the military.

THE COURT: If they felt that way, why not let them go? They wouldn't be very good neighbors anyway; would they?

THE WITNESS: Perhaps not, but panic-selling is not something that seems to work very well for a community life.

THE COURT: What difference does it make where he lives or what color he is if he's a good neighbor? How would that depreciate value?

THE WITNESS: I agree with you. I agree with you. But I think when there is an atmosphere of panic, people tend to settle for less than value of the market value of their house.

THE COURT: All right.

21. § 3604. Discrimination in the sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

* * *

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin. As amended Pub. L. 93-383, Title VIII, § 808(b)(1), Aug. 22, 1974, 88 Stat. 729.

response to a "blacks-lower-values" syndrome. Concluding its review of the Council's purpose, the court stated that "fear of declining property values * * * cannot be the concern of this court when it results in an abridgement of constitutional rights." But, though the Council acted in recognition of that fear, it acted to *chill its effects,* not to foster it. The proliferation of signs plays to the very fear so properly excoriated by the district court.[22] Prohibiting signs removes the genesis of that fear.[23] Striking down the ordinance cannot expunge the "sell before it's too late" notion from the minds of all homeowners in Willingboro. Contrary, of course, to its desire and intent, the district court's stifling of the Township's effort to strangle at birth the fear of blacks-lowering-values could only result in the continued, sign-generated encouragement of that fear.[24] The ordinance herein was not adopted at the instance of those who would flee from blacks. On the contrary, it was aimed *against* the white-flighters by those who wanted whites to stay when blacks moved in. An ordinance designed to blunt the effects of a human foible should not be struck down because the foible exists. An ordinance intended and designed to impede the exercise of anti-black fear cannot itself be considered anti-black. The cancer fighter cannot be blamed for the existence of cancer.

---

22. Because of its apparent influence below, we discuss herein only the "white flight" element of the fear of lower values generated by "For Sale" and "Sold" signs. It is clear, however, that a proliferation of such signs in any neighborhood, even in a nation of citizens of one color (or in that happy nation of the color-blind), is productive of the impression that something is wrong, many are leaving and lower values are imminent. The phenomenon feeds on itself as sellers rush to avoid being "stuck." The over-supply of any product for sale is recognized as likely to lead to lower prices. Plaintiff Mellman said he personally used discretion because "too many signs in a particular area" does not market properties because "it may scare people." When asked about watches, Mellman said, "Yes, I think you can overflood any market."

23. Thus the ordinance herein parallels the federal Fair Housing Act, which makes unlawful the written expression of discriminatory intent. 42 USC 3604(c). See also, *United States v. Hunter,* supra, denying application of First Amendment protection to an advertisement of a residence available in a "white home."

24. Though the district court mentioned "when the end can be more narrowly achieved," it described no other means and none appears in the record.

We agree with the following statement of the NAACP Legal Defense and Educational Fund in its *amicus curiae* brief in *Barrick* (quoted at 491 F.2d 165):

> The interest of both the black and white citizens in stable communities outweighs any minor inconvenience of having to utilize alternate methods for advertisement and information gathering.

The Effect of the Ordinance

The district court considered as "even more important" than the limitation of the right to express a desire to sell, its conclusion that potential purchasers would have "no way of learning what is available." We find the conclusion unsupported, in view of the record-established fact that 70% of the inquiries of purchasers stem from other sources. As was said in *Barrick,* supra:

> One of plaintiffs' exhibits reveals that in 1972, prior to the date the ordinance became effective, nearly three-fourths of Barrick Realty's home sales were to persons first attracted to the property by means other than a "For Sale" sign. Thus the ordinance does not make it unduly difficult to sell a house; it only makes it slightly more expensive to do so. Accordingly, the burden of property rights is small, and any effect on the right to travel is insignificant.

Nor can we find support in the record for the district court's conclusion that purchasers would be "forced" to use a broker, or that a broker might be the only one capable of apprising a buyer, or that "he alone" is aware of homes for sale. As the testimony made clear, newspaper ads were widely used and remained freely available. There was no indication at trial as to the percentage of homes sold through brokers prior to or after the ordinance. Moreover, the very purpose of a sign posted by a broker is to direct buyers into his hands. In this regard we note that

the plaintiffs who seek reinstatement of the signs are two business entities dealing in real estate, one a broker.

But the district court went on to assume that unscrupulous realtors would engage in "steering,"[25] returning to that theme at three points in its opinion. For the reasons given below, we think the district court erred in resting its decision on a presumption of perfidy.[26]

There is no evidence in the record of any racial discrimination, actual or intended, against any person or

25. The only specific reference to "steering" at the trial related to a different community and constituted a denial that purchasers had to be "steered":

BY MR. HAUCH:

Q. And that is, in connection with Medford Lakes, you said that they don't have signs out there; and if it's been reported to you one of your fellows has a minority family interested and calls up out there, they say, "Don't bring them out here"; is that correct?

A. That's correct. They have taken them out there, though.

Q. All right.

Then these people have no way themselves in seeing, by riding around, what's available to you; right?

A. That's right.

Q. So they have to be steered to something, in other words?

A. No. Flip open the multiple listing book and let them find their own house. In other words, they designate the geographical area they'd like to be in relative to where they work in most cases.

Q. They have to be in your office to see this book?

A. In any municipality—

Q. Some realtor's office who is a member of M.L.S.?

A. Well, there are 82 of them in Burlington County.

Q. They have to get into an office to see the book though, whether it's your office or one of the other fellows?

A. Or read the paper, right.

Q. Or read the paper. Right?

A. That's right.

Moreover, reference to Medford Lakes was unnecessary to establish that realtors may "steer." That realtors may "steer" as well as "blockbust" is recognized in law. 42 USC § 3604.

26. The analysis of the district court is flawed by the fact that the presumption ran only to realtors who might be "very selective which home" to show a buyer or who might "arbitrarily regulate the racial and ethnic development" of an area, i.e., realtors who might engage in "steering." The analysis makes no assumption that unscrupulous realtors might, in the absence of the ordinance, engage in an opposite form of racial discrimination, i.e., the creation of segregated areas by "blockbusting." Both forms of conduct are illegal under the federal Fair Housing Act, the former under 42 USC § 3604(d) and the latter under 42 USC § 3064(e). The district court's limitation of its view of potential perfidy may have been occasioned early in the trial, when plaintiffs' counsel objected to a question touching on "blockbusting," and described "unscrupulous realtors" as an "assumption":

> MR. HAUCH: If counsel wants to ask whether or not the New Jersey statute against discrimination might restrict the market, all right. But going beyond that, unscrupulous realtors, and the other assumptions, I really can't follow or think an opinion can honestly be expressed on it.

group in the sale of Willingboro residences.[27] There was no evidence that any potential purchaser had been denied equal opportunity to acquire any residence in Willingboro and no evidence of such buyer having been directed to any particular area or having been denied full knowledge of which homes were available in Willingboro. Nor was there any evidence establishing a cause and effect relationship between the ordinance and such illegal practices. There was no evidence relating the ordinance to minority house purchasers. Nor could there be. The effect of the ordinance falls equally on white and black buyers. Thus the evidence fails to support the district court's speculation that any Willingboro broker desired or might desire to "stimulate and prey on racial bigotry and fear" or to "create or perpetuate ghettos." On the contrary, the evidence established that Willingboro had achieved an integrated status remarkably free of discriminatory practices and that the governing Council was alert to the threat to that status which resided in the cause and effect relationship between the signs and panic-selling. In the absence of evidence connecting the ordinance to racial discrimination, we cannot condemn it on those grounds.

27. The dissent's reference to Medford Lakes is difficult to understand. Discrimination had been rampant there for years. There was no evidence that that discrimination was due to, or even facilitated by, an anti-sign ordinance. No Medford Lakes ordinance was placed in evidence. There was no probative evidence that Willingboro's ordinance was modeled after one of Medford Lakes. Plaintiffs' counsel cut off Evans' answer and *objected* to testimony about Medford Lakes, indicating that discrimination there was due to a "community restriction":

> Q. In your opinion, as having been a realtor selling in Medford Lakes, has the sign ordinance been proposed, the ordinance there, which prohibits for sale signs being erected, has that been utilized as a furtherance of segregation in Medford Lakes?
>
> A. Absolutely—
>
> MR. HAUCH: If your Honor please, I just want to get one thing clear for the record. I'm not sure they have an ordinance in Medford Lakes that prohibits signs.
>
> THE COURT: Do we know that?
>
> MR. HAUCH: It's never been testified. I think closer to it is that there is a community restriction that's been in effect for a number of years.

Nor will we imply the social guilt known as racism. Society is not assisted by the implication of that insidious trait. We still have enough of the real thing around.[28]

The concern of the district court for the possibility of collusive racial discrimination in the sales process was thus overdrawn and at least premature. It is, of course, always possible for homeowners and brokers to enter a conspiracy in which owners would list only with brokers, both would refrain from use of either "For Sale" signs or newspaper ads, and the brokers would then lie about the availability of homes. But that possibility exists with or without the ordinance. And, with or without the ordinance, such practices would be violative of the federal Fair Housing Act, 42 USC § 3604, and of the New Jersey statute against discrimination, N.J.S.A. 10:5-1 et seq. We will not construe the ordinance as permitting that which federal and state laws forbid. A discriminatory purpose in the administration of laws fair on their face will not be presumed. *Snowden v. Hughes,* 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944).

Nor can we visualize the massive conspiracy that would be necessary to carry out effectively the discriminatory scheme envisioned by the district court Homes listed with any broker-member of the M.L.S. are available to all of the other 82 realtor members, among whom are two black realtors and plaintiff Mellman. That all 82 realtors would illegally "steer" black buyers into a particular area and away from other areas is so unlikely as to require strong evidence before acceptance. Moreover, such a plan would be difficult to start in Willingboro, where there was no "black" section to which blacks might initially be "steered." Further, as reflected in exhibits P-4 and P-5, the standard listing agreement with all members of the M.L.S. contained a memorandum of the Attorney General

28. The district court commented in colloquy at the trial that the "heart of the [racial] problem all along" has been "mistrust everyplace." We join that view, with the suggestion that mistrust between races will not be cured by mistrust within a race. Judicial decision cannot rest safely on suspicion.

of New Jersey which set forth the illegality of "steering" and other discriminatory practices. Still further, the federal Fair Housing Act, 42 USC § 3604(g), prohibits the denial of access to M.L.S., real estate organizations, or other services relating to the business of selling and renting dwellings. That it is necessary, in order to invalidate the ordinance, to visualize the remote possibility of such a widespread conspiracy to violate the law, confirms to us the fundamental validity of the ordinance.

Racial classifications are constitutionally suspect, but the present ordinance contained and effected no racial classifications. It fell, without discrimination, on all realtors and on all races, colors and creeds alike.[29] The actual effect of the ordinance, during the four months of its existence, was described at the trial by a number of witnesses, without contradiction, as appearing to have achieved its purpose. The talk of moving in fear of minorities was described as having ceased and the number of actual moves for that reason was described as having been reduced to a minimum.

The Right to Travel

We find no evidence to support the conclusion that the ordinance burdens anyone's right to travel. Houses in Willingboro are sold through the same channels with the ordinance as they were prior to the ordinance. Sellers are free to sell to any economically qualified buyer. Economically qualified buyers of any racial group are free to buy any home in any section of Willingboro. No burden on commerce or a deterring influence on the individual right to migrate has been shown. See *Village of Belle Terre v. Boraas,* supra, note 14; *Shapiro v. Thompson,*

29. The dissent states the obvious principle that an ordinance having an intended purpose of limiting access of minorities to housing in the Township could not pass constitutional muster. That principle is established, but inapplicable here.

394 U.S. 618 (1969), *Construction Industry of Sonoma County v. City of Petaluma,* 522 F.2d 897 (9th Cir. 1975), petition for cert. filed Dec. 30, 1975.

The district court's "natural conclusion" regarding the right to travel rested on the erroneous belief that real estate "For Sale" signs were the only means of learning what homes were available and that the absence of such signs delivered all buyers into the hands of brokers who might be unscrupulous. The fact that 70% of inquiries come from sources other than signs, the fact that the absence of signs has the same effect on whites as on blacks, and the fact that no pattern of racial discrimination had existed in Willingboro for 14 years, all go to confirm the error in that conclusion and the error in striking the ordinance herein on that basis.

Conclusion

As discussed above, the ordinance did not deny expression, through other media such as newspaper ads, of the desire to sell. The danger present in piecemeal limitation on the exercise of constitutional rights has long been recognized. However, the prohibition of the use of residential signs as tools for proposing a commercial transaction, while leaving other and more widely used means available for such announcement, does not in our view rise to the level of an impermissible denial of the constitutional right of free speech or of the right to travel.

Balancing the interests involved we conclude, in the light of the foregoing considerations, that the governmental interest in prevention of panic-selling, and of the evils attendant thereon, is sufficient to free the ordinance banning "For Sale" and "Sold" signs on residential property in this case from constitutional infirmity.

Accordingly, the judgment of the district court must be reversed.

Gibbons, C.J., dissenting

This is an appeal from a final judgment of the district court, entered after a non-jury trial on the merits, based on findings of fact, holding unconstitutional an ordinance of the Township of Willingboro, New Jersey. The district court's findings of fact, far from being clearly erroneous, are compelled by the record. Those findings of fact amply justify the district court's legal conclusion. Because I believe the majority has ignored or distorted the district court's findings and has thereby substituted its own version of the facts for those found by the trier of fact, I cannot join in the court's opinion. And because even on this unsupported version of the facts the majority has misstated or misapplied the governing principles of law in sustaining the challenged ordinance, I respectfully dissent.

Ordinance No. 5-1974, which we review in this case, is an amendment to Chapter XVII of the Revised General Ordinances of the Township of Willingboro, New Jersey. Chapter XVII in twelve sections deals comprehensively with the erection and maintenance of signs. The central operative provision of the chapter is § 17-2:

> 17-2 Legality
>
> Signs may be erected and maintained in the Township of Willingboro only when the same comply with the provisions of this chapter, and it shall be unlawful to erect or maintain any sign at any place within the said Township of Willingboro when the same does not comply with the provisions of this chapter.

Thus the purpose of Chapter XVII is to flatly prohibit, with enumerated exceptions, the erection and maintenance of signs in the community. Among the several exceptions to the general prohibition are those listed in § 17-6:

> 17-6 Residential Zones
>
> The following signs are permitted in those areas of the Township of Willingboro which have been zoned for residential use.

There then followed, prior to the adoption of Ordinance No. 5-1974, five specific designations [1] of signs permitted in areas zoned for residential purposes. Section 17-6.5, encaptioned "Rental Signs", provided:

> 17-6.5 Rental Signs. Signs pertaining to the lease, rental or sale of the premises on which they appear, subject to the following conditions:
>
> a. The size of the sign shall not exceed eight square feet in area.
>
> b. The sign shall be located upon the premises to which it pertains and shall not project beyond the property line of such premises.
>
> c. Such signs shall be removed within five days after the execution of any lease, rental agreement or agreement of sale for the premises in question by the occupant of the premises and/or the owner of the sign.
>
> d. Not more than two such signs are to be placed upon any property.

The challenged ordinance repealed § 17-6.5. As a result of the repealer the general prohibition in § 17-2 became applicable to any sign relating to the lease, rental or sale of a home in Willingboro.

The district court found:

> "[I]t appears that the true thrust of these sign ordinances is to promote a racial balance or more properly a racial imbalance in order to perpetuate existing racial lines.
>
> There can be no doubt that this is precisely the result desired by the Willingboro Town Council in adopting this ordinance."

1. The other exceptions included: Nameplate or Identification Signs, § 17-6.1; Professional Signs, § 17-6.2; Non-Business Usage Signs, § 17-6.3; and Specific Recreational Activities Signs, § 17-6.4.

Having found that the intended purpose of the amendment was to limit the opportunity of property owners for communicating the availability of their residences to potential minority occupants, the court went on to find:

> "Even more important is the concomitant result: one who wishes to purchase a home in Willingboro has no way of learning what is available. He only has the 'option' of choosing a home from those which he is shown by a realtor, thereby necessitating the use of a real estate brokerage firm. Further, the broker or salesman may be very selective in choosing which home he wishes to show a potential buyer."

Thus the court found that both the intended purpose and the likely effect of the repealer was to limit the access of minorities to housing in the Township. No ordinance having that intended purpose and likely effect, I submit, can pass constitutional muster. Because the district court's factual conclusions are clearly if not overwhelmingly supported by the record evidence, the judgment of unconstitutionality must be affirmed.

I. The Town Council's Intended Purpose in Enacting Ordinance No. 5-1974.

The plaintiffs' case consisted primarily of the minutes of two public hearings which were conducted by the Willingboro Town Council prior to the adoption of Ordinance No. 5-1974. Those minutes, Exhibit P-3, were offered "in the nature of a joint exhibit. It's agreed that they do accurately reflect what was said at the meetings on the subject." (131a-32a). After examining the minutes of those hearings one can reach only one conclusion: The unmistakeable stimulus for the proponents of repeal of § 17-6.5 was the fact that the non-white population had

increased from under 12% in 1970 to over 18% in 1973.[2] Ordinance No. 5-1974 was a transparent effort to perpetuate existing racial balance and arrest the growth of Willingboro's non-white population. The transcript of the hearings alone amply supports the district court's finding that maintenance of an existing racial balance was the primary motivation behind the ordinance, and the supplementary evidence presented on behalf of the Township makes any other conclusion as a matter of law inescapable.

The Township defendant presented one exhibit, D-1, at trial. This exhibit tabulated the results of a demographic study of the racial composition of Willingboro's population over a period of years (128a):

Year	*Total Popul.*	*White Popul.*	*Black Popul.*	*Other Popul.*	*Non-White Popul.*	*Percent Non-White*
1950	852	Unavail.	Unavail.	Unavail.	Unavail.	Unavail.
1960	11,861	11,801	6	54	60	.005
1970	43,414	38,326	4,738	350	5,088	.117
1973	44,607	36,485	7,637	485	8,122	.182

It also offered the testimony of several witnesses. The first of these was Donald C. Evans, a proponent of the Ordinance and a realtor whose office and residence were in Willingboro. On direct examination he testified (157a-58a; 162a):

> Q. Now, listen to my question and answer that: Did you have occasion to discuss with prospective

2. *See, e.g.*, Exhibit P-3, statements of MacNow (29a-30a); Jones (31a-32a); Kirk (40a-41a); Wortman (43a-44a); Miller (51a); Yost (56a); Turoski (59a-60a); Dubin (65a); Fleetwood Realty (72a); Wortham (76a); Taraschi (91a); Cohen (96a); Klingenberg (97a-99a); Grindlinger (102a); Connolly (108a); Boyd (110a); Cannon (110a-11a); Brooks (116a); Councilman Kearns (118a-20a); Councilman Krane (120a); Councilman Heath (121a); Councilman McGrath (122a). In footnote 4 the majority attempts to denigrate the significance of this exhibit by emphasizing that it was admitted not for the truthfulness of the statements but only to establish what happened at the meeting. But the racist suggestions are no less evidence of motivation because they are, as I believe them to be, false. The fact remains that fear of minority in-migration was the stimulus for the ordinance. The majority apparently would require that we accept as true the underlying beliefs about minorities before we can accept the expression of such beliefs as evidence of motivation.

> purchasers the situation in Willingboro prior to the enactment of the ordinance? I'm talking about now the amount of for sale signs and the reaction, if any, that would be developed in these prospective purchasers by this.
>
> A. The answer is yes.
>
> Q. What was that? What were those discussions?
>
> A. There were many in number for people that I have taken out to show a house to. And then if there has been two or three signs on the same street, the question has been: Is there something wrong with this street? Is this street going black? And I've had that question asked of me a number of times.
>
> Q. How about with taking it the other way, again, before the enactment of ordinance, with discussing this with prospective sellers of homes, did you similarly have discussions with them?
>
> A. Yes.
>
> Q. And did they have an opinion as to the situation involving signs in the township?
>
> MR. HAUCH: If your Honor please, I have to object to him expressing someone else's opinion to this witness.
>
> BY MR. GOTTLIEB:
>
> Q. Was there a community assessment conveyed to you?
>
> A. Very definitely.
>
> Q. By purchasers—By sellers, excuse me. And what was that sentiment?
>
> A. Yes. The sentiment was that the signs were bringing in brokers that were non-MLS from out of town, and bringing in—
>
> THE WITNESS: How do I say, your Honor? I don't want to restrict it to 'black'—
>
> A. (Continuing)—but minority groups in order to sell them into Willingboro.
>
> . . . .

Q. Well, in what way would the presence of signs lead to less of a stabilization?

A. Well, you have an opinion. People that have watched houses being sold, beside them or on the street, and there are one out of five will go to a minority, and they'll make this statement: 'Boy, the next time one goes up for sale, if another black moves onto the street, I'm going to sell and move.'

Q. Did you find this to be a prevalent attitude prior to the enactment of the ordinance?

A. Absolutely.

On redirect examination Evans was asked and answered (171a):

Q. In your opinion, as having been a realtor selling in Medford Lakes,[3] has the sign ordinance been proposed, the ordinance there, which prohibits for sale signs being erected, has that been utilized as a furtherance of segregation in Medford Lakes?

A. Absolutely—

The next witness called by defendants was William J. Kearns, Jr., a member of the Township Council. On direct examination he testified (179a-81a):

Q. Were you, prior to the winter of '73-'74, able to obtain a feeling on the community sentiment with respect to for sale signs in the township?

A. I believe so, yes.

Q. And what was that opinion at that time?

A. I think there was very definitely a feeling in the community that something should be done to prohibit real estate signs in the community.

I think the public sentiment started developing probably as early as '72, became somewhat more—somewhat stronger as people became more concerned

3. Medford Lakes is a nearby community whose sign ordinance served as a model for the Willingboro ordinance.

in 1973, and culminated with the adoption of the ordinance in 1974.

Q. That's the general opinion.

What was the basis for that opinion in these people? Did you—in the people. Did you ever discuss this with them?

. . . .

A. Yes, I discussed it with a number of people, and I think that the concern that was generally expressed was that people in the community were expressing a desire to sell their homes and move to other areas of Burlington County because what they sensed was a lack of stability or a large turnover in the community, and that this large turnover was resulting in a substantial influx of minority groups into the community beyond what could be sustained without the community itself turning into a ghetto within the county.

Kearns also testified that Willingboro was initially developed as an all-white community, and was integrated in the early 1960s only after a suit against the principal developer, Levitt and Sons, Inc., was successfully pressed.[4]

Steven E. Heath, another member of the Willingboro Township Council, was the next defense witness to be called. He testified (205a-06a):

Would you indicate to the Court what your understanding was of the community sentiment in 1972, the beginning of '73, and so on, with respect to the posting of for sale signs in the community?

A. The community was overwhelming in favor of abolishing all for sale signs.

THE COURT: All real estate signs?

THE WITNESS: That was of a residential nature.

4. Levitt & Sons, Inc. v. Division Against Discrimination in the State Dep't of Educ., 31 N.J. 514, 158 A.2d 177, *appeal dismissed per curiam*, 363 U.S. 418 (1960).

A. (Continuing) There was never any discussion, to my knowledge, of commercial signs at any of the meetings I attended, about commercial signs, model home signs, anything of that nature never entered into it.

There is a separate question that's going on right now about the signs of certain commercial signs and things like that.

But the specific, in fact, I believe became one of the key issues in my campaign when I was elected, the whole question of real estate signs and the nature of the community and the quality of the community we have, and the fact that we feel we have a community that's a leader in the country in terms of human relations, and that we are being taken advantage of in certain ways.

And as a consequence, a number of people in the community were beginning to lose some of the pride and the faith they had in the community.

One individual—I heard him mention specifically at a party and a number of other people say that they had to get out of Willingboro because the great experiment wasn't working, it was failing. That: 'Look what's happening to property values. Everybody wants to sell their home.'

And particularly people who live in the townhouse sections of Rittenhouse Park and Fairmount Park where homes are clustered quite closely together on a court. One or two real estate signs and, you know, they look like a lot more than one or two when they are that close together. And people would say: 'Everybody in Rittenhouse wants to sell. What's happening?'

And you get five or six signs in a row on a particular street, and different neighbors on the street—I saw it happen on my own street, almost all of us.

In fact, I'm the shortest with one exception, the shortest resident on my particular end of the street.

To a question put to him by the court Heath replied (206a-07a):

THE COURT: Is it a problem there—I think Mr. Kearns said it was a device—that is, this ordinance, is it a problem of minority affecting property values where you people thought it was going to get away from you? Is that a fair question, number one?

THE WITNESS: I think it's a fair question. If I can explain a little bit?

THE COURT: Yes.

THE WITNESS: Right now, and over the last few years, we have experienced an increase in property values. In the minds of most people who read the papers and follow, in the last three or four years our property values have not been increasing at a rate as great as property values in other neighboring towns. People continuously say, 'You can't buy a house for $30,000 in any other town but you can in Willingboro.' If that house was only in Cinnaminson or in Moorestown, move it a mile across the line in Westampton, it would be over $40,000.

THE COURT: You mean that was a general thing?

THE WITNESS: Because that's true in any town that was the general feeling. And the reason for this was no one wanted to buy houses. You know, when you are a property owner, whether the sales are going or not, you have a general opinion. You drive around. People would see a lot of signs. They would say: 'Everybody wants to sell. This must be because there are too many blacks in town; and if we don't do something about it, boy it's just going to go, and let's sell and get out now.'

And what we're trying to do is kind of nip it in the bud and stop it now before too much of this got out of hand.

And at this point we could stop it, still continue to have our property values rise, but stop the individual home owner from thinking: 'Boy, if I don't get out now, I am going to lose my investment.'

THE COURT: All right. Thank you for being candid with me.

Another witness, Valeria Gladfelter, a member of the Willingboro Human Relations Commission, testified about racial incidents in the early 1970s. She then said (231-33a):

Q. Were you able to ascertain a general community sentiment in Willingboro with respect to the racial situation and its relationship to the real estate for sale signs?

A. Yes, I think so.

Q. Okay.

And what is that sentiment that you were able to observe?

A. People expressed concern on seeing large numbers of for sale signs that neighborhoods would undergo rapid racial change, and this was a cause of worry to them.

She added that this expressed concern persuaded the Human Rights Commission to recommend the prohibition of "For Sale" or "Sold" signs on houses in the community. The testimony of Alexander W. Porter and the Rev. Ernest Shaw Lyght, both members of the Human Rights Commission, corroborated that of Mrs. Gladfelter. One must attach great significance to the fact that all of the defense witnesses consistently testified that the intended purpose of Ordinance No. 5-1974 was to stabilize the Township's racial balance. In my view any factual con-

clusion other than that drawn by the district court would be clearly erroneous. Certainly the conclusion the court did draw is not clearly erroneous. But in utter disregard of the standard of review imposed on this court by Rule 52, Fed. R. Civ. P., the majority, by a disingenuous process of selection and omission, sifts through the record below to construct its own findings to justify a predetermined result. On this record no appellate tribunal can properly hold that the district court's conclusion respecting the Town Council's intended purpose in enacting Ordinance No. 5-1974 "(1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Krasnov v. Dinan,* 465 F.2d 1298, 1302 (3d Cir. 1972); R. Aldisert, The Judicial Process 690-92 (1976). The majority opinion completely inverts the respective roles of the trial and appellate courts, and is an instance of ad hoc decision making.

II. THE LIKELY IMPACT OF THE WILLINGBORO ORDINANCE.

The majority refuses to attach any significance to the district court's conclusion that the effect of Ordinance No. 5-1974 is to steer prospective home purchasers to local real estate brokers, who may in turn be very selective in the property they wish to show a potential purchaser. It urges that the district court's conclusion is unsupported by record evidence. Manifestly there is no such absence of evidence here. Co-plaintiff William Mellman, a real estate broker with an office outside Willingboro, testified that approximately thirty percent of the inquiries to his office from prospective purchasers originated when a prospective buyer viewed a "For Sale" sign on a property he liked. (135a). Defendants' witness Evans, a broker based in Willingboro, testified that his firm was very happy maintaining an 80/20 white/non-white racial mixture in

the community. (160a). He also testified that since the ordinance was adopted he acquired "a good 25 percent more of the market in Willingboro than [he] had a year ago," and that the increase resulted from the diversion of sales from an out-of-town broker unable to display its signs on homes in the community. (164a). Evans also testified that (165a; 172a):

> Q. I think, going back about two, three years, were you familiar with the real estate situation in Medford Lakes with respect to posting signs or not?
>
> A. I am very familiar with it, right.
>
> Q. Can they post signs?
>
> A. They cannot.
>
> Q. How many black families are there in Medford Lakes?
>
> A. To my knowledge, not one. I only know of the first Jewish family that moved in under great protest.
>
> Q. And that's recent?
>
> A. About two years ago, I believe.
>
> Q. And I believe that back about three years ago, you were impressed with the way Medford Lakes handled their real estate transactions; weren't you?
>
> A. No. I was impressed with Todd Realty, in the way he handled it. I was not impressed with the way that they had their integration, lack of integration.
>
> Q. And they still have that?
>
> A. They certainly do.
>
> Q. And they still prohibit signs?
>
> A. They certainly do.
>
> . . . .
>
> Q. Has that been used in Medford Lakes to keep minorities out of Medford Lakes?
>
> A. My salesmen have been asked: "Is that person black? Don't bring him out here."
>
> Q. Okay.

> In Willingboro now, bringing it back home, the prohibition of the signs, is it your opinion that the community desired this in order to prevent minorities from moving into town?
>
> A. No.
>
> Q. What was the community sense on this?
>
> THE WITNESS: I think that, if I may, your Honor, I have, for instance, seven of my sales personally, a retired military—We've been all over the country. We've purchased homes ourselves in Willingboro. We think it's the greatest place we ever found in the country. And all we want to do is maintain a stability, because we have more in Willingboro than we found in any other town. And they feel that with this sign ordinance now, they've been given the opportunity to work with compatible real estate brokers under the multiple listing service who are doing above board ethical job of selling real estate.

In paraphrase Evans testified that in Medford Lakes the local brokers, with an assist from the sign ordinance, maintained a zero quota for minorities.[5] In Willingboro, with a similar assist, the local brokers will be satisfied to maintain a 20 percent quota. The uncontradicted evidence demonstrates that the sign ordinance enhanced the competitive position of the local brokers in the market; that brokers were capable of action directed toward excluding minorities from residence in Willingboro; that in a neighboring community such action was completely effective; and that since the Willingboro ordinance was adopted

5. The majority takes me to task, Majority Opinion at 29 n.27, for adverting to this testimony about Medford Lakes. Of course the fact that Medford Lakes' similar sign ordinance had both the purpose and effect of perpetuating racial segregation is only marginally probative of facts relating to the adoption of Willingboro Ordinance 5-1974. But it does suggest that behind a facially neutral law may lurk the most sinister of motives. Where it is shown that a particular kind of ordinance can be and has been used as a pretext for racial discrimination, it is incumbent upon courts to examine closely motives underlying adoption. A court cannot, as the majority has done, Majority Opinion at 30, don blinders to reality under the pretext of condemning the practice of looking for a racist under every bed.

"[w]e are still representing a straight about 80/20 minority to white seller and buyer, both sides just maintaining a perfect balance, and we're actually very happy." (160a). The population trend observed between 1970 and 1973, in other words, has been arrested. The majority's declaration that there is "no evidence in the record of any racial discrimination, actual or intended, against any person or group in the sale of Willingboro residences"[6] is patently contradicted by the record below. Again, I protest the distortion of the appellate process by which the majority substitutes its own findings for those of the district court.[7]

III. The Governing Law.

Guided by its findings of fact, the district court concluded that Ordinance No. 5-1974 was a regulation of speech in unlawful derogation of first amendment rights and an unconstitutional burden on the right to travel of possible home purchasers denied access to first-hand knowledge of the Willingboro real estate market. The majority addresses these constitutional arguments and concludes that the ordinance suffers no constitutional infirmity. For the reasons set forth in Part IV of the dissenting opinion, I disagree with the majority's analysis of these issues.

But there is a much simpler and more direct analysis which compels affirmance of the judgment below. The intended purpose of the ordinance is to discriminate against racial minorities by "stabilizing" the non-white population of Willingboro at not more than 20 percent. This is

6. Majority opinion at 28-29.

7. The majority detects a fatal flaw in the district court's "presumption of perfidy." Majority opinion at 28. The majority also faults the district court for making "no assumption that unscrupulous realtors might, in the absence of the ordinance, engage in an opposite form of racial discrimination, i.e., . . . 'blockbusting'." The record reveals, however, that the district court's "presumption of perfidy" was based on an overwhelming body of fact. In contrast, the majority cites no record evidence upon which a presumption of blockbusting can be based. Moreover, the majority correctly points out that Congress has already legislated against the practice, 42 U.S.C. § 3604(e), so no local regulation would appear necessary even if appropriate. In any event, that the ordinance may incidentally regulate illegal conduct cannot legitimize its patently discriminatory purpose.

not affirmative action to overcome the effects of past discrimination, but is invidious discrimination of the most pernicious sort, against a discrete and insular minority seeking fulfillment of the American Dream of owning a home in the suburbs. This is a classic example of de jure racial discrimination. Certainly an ordinance which on its face manifested a purpose to maintain a racial quota in Willingboro would be facially unconstitutional. But statutes which are facially neutral have nevertheless been held to violate the equal protection clause if they are intentionally applied for discriminatory purposes. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). Moreover, the Supreme Court has found de jure discrimination in statutes which are facially non-discriminatory but which were adopted as the result of a discriminatory legislative motive. *See, e.g., Griffin v. County School Board,* 377 U.S. 218 (1964); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960).[8]

8. Palmer v. Thompson, 403 U.S. 217 (1971), is not to the contrary. In that case an equal protection challenge was mounted against action of the City Council of Jackson, Mississippi, closing for racial reasons a public swimming pool. The Court sustained the council's action, which impacted equally upon blacks and whites alike. The Court admitted that language in *Griffin* and *Gomillion* suggested that an inquiry into legislative motive was relevant for equal protection purposes but distinguished them by saying that

> the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did. In *Griffin,* as discussed *supra,* the State was in fact perpetuating a segregated public school system by financing segregated 'private' academies. And in *Gomillion* the Alabama Legislature's gerrymander of the boundaries of Tuskegee excluded virtually all Negroes from voting in town elections. Here the record indicates only that Jackson once ran segregated public swimming pools and that no public pools are now maintained by the city. Moreover, there is no evidence in this record to show that the city is now covertly aiding the maintenance and operation of pools which are private in name only. It shows no state action affecting blacks differently from whites.

Id. at 225.

Palmer v. Thompson is not inconsistent with the scrutinization of legislative motive in this case. This is apparent from the next paragraph of the Court's opinion:

> Petitioners have argued strenuously that a city's possible motivations to ensure safety and save money cannot validate an otherwise impermissible state action. This proposition is, of course, true. Citizens may not be compelled to forgo their constitutional rights because officials fear public hostility or desire to save money. But the issue here is whether black citizens in Jackson *are* being denied their constitutional rights when the city has closed the public pools to black and white alike. Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools

Although expressions of the Supreme Court's disinclination to review laws on the basis of legislative motive trace back to Chief Justice Marshall's admonition in *Fletcher v. Peck,* 10 U.S. [6 Cranch] 87, 130 (1810), that point of view has been eclipsed by more recent events. Certainly it is too late in the day to urge that federal courts will close their eyes to patent manifestations of pernicious legislative motive, or even that they will not search the legislative backwaters for more subtle currents. Indeed, judicial review of legislative purpose is compelled by the Supreme Court's tri-partite test in establishment clause cases. *See, e.g., Meek v. Pittenger,* 421 U.S. 349, 358, 362-63 (1975). Where, as here, evidence of a purpose of "stabilizing" the non-white population in the community is advanced by the defendants through their own witnesses as the reason for adopting the ordinance, we cannot ignore it. Where, as here, a discernible discriminatory impact can be anticipated by operation of the challenged enactment, we must grant relief against that threat to liberty. I am completely satisfied by the case made out by plaintiffs in the court below. Ordinance No. 5-1974 is in utter conflict with the equal protection clause of the fourteenth amendment and is null and void.[9]

IV. The Majority Legal Analysis.

Since the majority declines to acknowledge the obvious—that Willingboro in adopting the ordinance intended

8. (Cont'd.)
to all its citizens constitutes a denial of 'the equal protection of the laws.' *Id.* at 226 (citations omitted).

Palmer v. Thompson thus holds that where there is a failure of proof as to the discriminatory *effect* of a legislative act or classification, judicial examination of legislative motive is inappropriate because even if a hostile motive were proved that would not, in the absence of evidence of effect, suffice to violate the equal protection clause. But where, as here (and as in *Gomillion* and *Griffin*), the challenged enactment has a demonstrable discriminatory impact, proof of racial animus makes out a prima facie equal protection case. *Cf.* Wright v. Council of the City of Emporia, 407 U.S. 451, 461-62 (1972).

9. Neither in the district court nor here did the defendants urge that the plaintiffs, both of whom have suffered some injury in fact, lack standing to assert the discriminatory effect of the ordinance. Nor does the Township contend that it is not a proper defendant in this action. An individual, Gerald Daly, is in any event clearly a proper defendant since he has the duty of enforcing the ordinance.

to facilitate discrimination against blacks—it must of necessity deal with issues which I would not reach. Since it does so I am constrained to register my dissent from its treatment.

(A) *Free Speech*

The district court held that the sign ordinance was intended to censor the message of the homeowner desiring to sell his home, and having a censorious purpose violated the first amendment. The majority holds that the district court erred. In so holding it relies on two separate lines of authority. The first, typified by *United States v. O'Brien,* 391 U.S. 367 (1968),[10] permits an incidental abridgment of first amendment rights by a valid governmental regulation of "nonspeech" elements of conduct, as long as the infringement goes no further than is required for the accomplishment of the "nonspeech" governmental purpose. The second line of cases upon which the majority relies involve the so-called "commercial speech" exception to the first amendment. The leading case is *Valentine v. Chrestensen,* 316 U.S. 52 (1942). These two lines of authority, analytically quite distinct, are discussed in the majority opinion in a manner which blurs the salient differences between them. Neither separately or together, however, do they support the conclusion that this ordinance can withstand first amendment scrutiny.

I do not share the majority's belief that the "incidental limitations" cases are at all apposite to the facts at hand. The common bond that unites this line of authority is that in each case a paramount governmental interest in regulating non-speech existed which justified restraining "speech" in an inevitable, albeit unintended and hence incidental, manner.[11] In this case, however, the shackle upon speech can hardly be dignified as incidental. The

10. In *O'Brien* the Court sustained the conviction of a Selective Service registrant who burned his draft card in a symbolic protest against the Vietnam War.

11. *See, e.g.,* United States v. O'Brien, *supra;* Smith v. Goguen, 415 U.S. 566, 586-87 (1974) (White, J., concurring).

cardinal purpose of Ordinance 5-1974 is censorship of the homeowner's message. Its effect is direct and purposeful. It is not an incidental restraint. The majority seems to acknowledge that the corrosive effect Ordinance No. 5-1974 has upon "speech" is intended, not incidental, when it urges that the "limitation on noncommercial speech falls upon an unspoken or invisible 'message' or communication of a nature insufficient to override that public interest on First Amendment grounds."[12] Notwithstanding Marshall McLuhan's observation that the medium is the message, the majority cites no authority in support of its position that an ordinance which regulates the content rather than the mere presence of a sign imposes a restraint which can be characterized as incidental or otherwise permissible for first amendment purposes. Ordinance No. 5-1974 is analogous to a law prohibiting political advertising by billboard. While I can only suppose that no court would uphold a statute so pointedly drawn,[13] I am morally certain that none would sustain it as but an incidental limitation on free speech.

Nor do I believe that the majority can find comforting support for its untenable thesis in such cases as *St. Louis Poster Advertising Co. v. City of St. Louis,* 249 U.S. 269 (1919) and *United Advertising Corp. v. Borough of Raritan,* 11 N.J. 144, 93 A.2d 362 (1952).[14] Those cases held that the general regulation of the business of outdoor advertising was within the compass of the state police power. Those cases offer neither a whit nor a jot of support for the exercise of the police power to accomplish a racially discriminatory end.

I also understand the majority to suggest, at least implicitly, that the Willingboro ordinance is a valid exercise of the municipal zoning power. What precise limita-

12. Majority opinion at 14.

13. *Cf.* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 128-30 (1973).

14. Majority opinion at 17 n.13.

tions inhere in this power are uncertain, but it may be inferred that the power itself is broad in scope. *See Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974). Nevertheless, the municipal zoning power derives from the state police power, *see Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926), and is subject to all the qualifications of that regulatory authority. I know of no case where a legislative enactment that is purposefully discriminatory has been upheld as a legitimate exercise of the police power, whether it occurs in the regulation of outdoor advertising, as discussed *supra,* or in a zoning ordinance, or in some other context. *See Village of Belle Terre v. Boraas, supra,* 416 U.S. at 6. By the same token, I know of no case which has ever justified the use of the zoning power for a purpose forbidden by the first amendment. The defendants perhaps recognize the implausibility of such a broad interpretation of the zoning power, for at no point in this litigation have defendants even hinted that the Willingboro ordinance could be validated on *Euclidean* grounds.

Since censorship of the message was the intended purpose and effect of Ordinance No. 5-1974, justification must be found, if anywhere, in authorities placing the message beyond the pale of the first amendment. The majority suggests the "commercial speech" doctrine fills the bill. That doctrine, if it can any longer be so dignified, originated in *Valentine v. Chrestensen, supra.* Justice Roberts' opinion is a singularly abrupt and cryptic treatment of a supposed exception to the first amendment, completely devoid of references to supporting authority. It was handed down in 1942, hardly a vintage year for first amendment jurisprudence. *See also Jones v. Opelika,* 316 U.S. 584 (1942), *rev'd on rehearing per curiam,* 319 U.S. 103 (1943).

By 1943 it may be inferred that the Court was having second thoughts about the wisdom of *Valentine v. Chrestensen,* and expressly declined to extend the case beyond the pamphleteering context. *See Murdock v. Pennsylvania,* 319 U.S. 105, 111 (1943); *Martin v. Struthers,* 319 U.S. 141,

142 n.1 (1943); *Jamison v. Texas,* 318 U.S. 413, 417 (1943). Thereafter the commercial speech exception more or less withered on the vine, as it were, until 1973, when in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 385 (1973), Justice Powell cited *Valentine v. Chrestensen* with what some might regard as tacit approval. In *Bigelow v. Virginia,* 421 U.S. 809 (1975), however, the Court reversed a conviction under a state statute making it a misdemeanor to publish any matter encouraging another to have an abortion. Since the defendant was the editor of a newspaper which published a paid advertisement placed by a New York Abortion Clinic, the commercial speech issue was squarely presented. Writing for seven members of the Court Justice Blackmun said of *Valentine v. Chrestensen:*

> But the holding is distinctly a limited one: the ordinance [banning handbills] was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se.*[6]

6. Mr. Justice Douglas, who was a Member of the Court when *Chrestensen* was decided and who joined that opinion, has observed, "The ruling was casual, almost offhand. And it has not survived reflection." *Cammarano v. United States,* 358 U.S. 498, 514 (1959) (concurring opinion). Mr. Justice Brennan, joined by Stewart, Marshall, and Powell, JJ., has observed, "There is some doubt concerning whether the 'commercial speech' distinction announced in *Valentine v. Chrestensen* . . . retains continuing validity." *Lehman v. City of Shaker Heights,* 418 U.S. 298, 314 n.6 (1974) (dissenting opinion). See also *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 393 (1973) (Burger, C.J., dissenting); *id.,* at 398 (Douglas, J., dissenting); *id.,* at 401 (Stewart, J., dissenting).

Id. at 819-20 & n.6.

Justice Blackmun pointed out that the *Pittsburgh Press* majority did not rest its decision on any commercial

advertising exception to the first amendment, and in fact reaffirmed the holding of *New York Times Co. v. Sullivan,* 376 U.S. 254, 269 (1964) that commercial advertising enjoys first amendment protection.[15]

It would seem, then, that *Bigelow v. Virginia* has laid to rest once and for all the notion that *Valentine v. Chrestensen* placed commercial advertising in the category of unprotected speech along with fighting words, *Chaplinski v. New Hampshire,* 315 U.S. 568 (1942), obscenity, *Roth v. United States,* 354 U.S. 476 (1957), libel, *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974) or incitement, *Brandenburg v. Ohio,* 395 U.S. 444 (1969). The majority may think otherwise, but I find the recently-expressed views of seven members of the Supreme Court more authoritative. *See Terminal-Hudson Electronics, Inc. v. Department of Consumer Affairs,* 44 U.S.L.W. 2337 (C.D. Cal. Jan. 6, 1976); *see also Millstone v. O'Hanlon Reports, Inc.,* 528 F.2d 829 (8th Cir. 1976); *Virginia Citizens Consumer Council, Inc. v. State Board of Pharmacy,* 373 F. Supp. 683 (E.D. Va. 1974), *prob. juris noted,* 420 U.S. 971 (1975) (No. 74-895).

Having taken *Valentine v. Chrestensen* out of the unprotected speech category the *Bigelow* Court, while acknowledging that advertising could be subjected to regulation aimed, for example, at preventing the perpetration of illegal activities, concluded that the Virginia statute, applied to advertising of legal activities, violated the first amendment. Justice Blackmun's analysis thus seems quite close to, if not identical with, that of *United States v. O'Brien, supra. Valentine v. Chrestensen,* thus viewed, appears to be nothing more than an application of the "incidental limitations" authorities. But whether it has been reduced to that status, or has some additional content, the case certainly cannot any longer be read as the majority reads it. There is no commercial advertising exception to

15. 421 U.S. at 821. *Pittsburgh Press* held that the speech in question—sex-segregated want ads—advanced an illegal commercial proposal, and for that reason was stripped of its first amendment shield.

the first amendment. The state may not adopt a law for the intended purpose of proscribing the advertising of a lawful activity. That was the intended purpose of Ordinance No. 5-1974, and the district court correctly held that it violated the first amendment.[16]

(B) *Right to Travel*

The district court, having found that the effect of the ordinance was to require prospective home purchasers to utilize the services of real estate brokers, drew the conclusion that it infringed upon the constitutional right to travel. Since I would hold that the ordinance involved de facto racial discrimination it is not necessary to rely on such esoteric areas of fourteenth amendment learning. But in fairness to the district judge I must again take issue with the majority's treatment of the record. Rejecting the factual predicate for the right to travel holding, the majority says

> "We find no evidence to support the conclusion that the ordinance burdens anyone's right to travel.
>
> . . . .
>
> The district court's 'natural conclusion' regarding the right to travel rested on the erroneous belief that real estate 'For Sale' signs were the only means of learning what homes were available and that the absence of such signs delivered all buyers into the hands of brokers who might be unscrupulous. The fact that 70% of inquiries come from sources other than signs, the fact that the absence of signs has the same effect on whites as on blacks, and the fact that no pattern of racial discrimination had existed in Willingboro for 14 years, all go to confirm the error in

16. The majority's first amendment analysis borrows heavily from the Seventh Circuit's opinion in Barrick Realty Inc. v. City of Gary, 491 F.2d 161 (7th Cir. 1974). I believe that the *Barrick* court's reasoning is flawed, for substantially the same reasons advanced in this dissent. I therefore reject *Barrick's* analysis as unpersuasive.

> that conclusion and the error in striking the ordinance herein on that basis." [17]

These statements are seriously misleading. Mellman testified that where signs are permitted 30 percent of the inquiries directly result from their display, and 30 to 35 percent result from newspaper and other advertisements. (147a). Thus according to the record evidence elimination of signs may produce a 30 percent reduction in inquiries. That substantial numbers of inquiries are generated by newspaper advertisements suggests that at least in some cases that medium may satisfactorily convey the homeowners' and real estate brokers' message. But that is not to say, as the majority blithely assumes, that Ordinance 5-1974 in operation would not cut off large numbers of prospective purchasers from meaningful knowledge of the Willingboro real estate market. Moreover, Evans' testimony establishes that his Willingboro brokerage office has benefited by the sign ordinance to the extent of a 25 percent increase in business. Certainly this uncontroverted evidence supports the district court's conclusion that the tendency of the ordinance is to force prospective purchasers to resort to brokers who might "stimulate and prey on racial bigotry and fear to create or perpetuate ghettos."

I protest the departure from settled principles of appellate review which the majority opinion represents. I would affirm the judgment of the district court.

17. Majority opinion at 31-32.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX A.

APPENDIX B.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 74-1120

LINMARK ASSOCIATES, INC., ET ALS.,
Plaintiffs

v.

THE TOWNSHIP OF WILLINGBORO, ET AL.,
Defendants

OPINION.

(Filed February 20, 1975)

APPEARANCES: *Archer, Greiner & Read, Esqs.,*
By: John P. Haugh Jr. Esq.,
Attorneys for Plaintiffs

Kessler, Tutek & Gottlieb, Esqs.,
By: Myron H. Gottlieb, Esq.
Attorneys for Defendants

FISHER, *District Judge*

Plaintiff Linmark Associates, Inc., a New Jersey corporation, is the owner of land and premises at 25 Sherwood Drive, Willingboro, New Jersey. These premises are presently listed for sale pursuant to a brokerage listing agreement with plaintiff William Mellman, a licensed real estate agent engaged in business in the Township of Willingboro.

The plaintiffs now move to have this court declare Ordinance No. 5-1974 of the defendant Township unconstitutional. This ordinance amended Section 17-6.5 of Willingboro's Revised General Ordinances, which had provided for the placement on residential properties of signs pertaining to the lease, rental or sale of the premises on which they appeared, subject to specific regulations regarding size, location and the time period during which display was permissible. The effect of the amendment is to prohibit, except on model homes, the placement of any signs relating to the lease, rental, or sale of the premises upon any property in the Township of Willingboro. Jurisdiction is based upon 28 U. S. C. A. Sec. 1343(3) and Sec. 2201.

Willingboro is a town of approximately 45,000 people. It is to a large extent a transient community, partly due to its proximity to the military facility at Fort Dix and in part due to the numerous transfers of real estate.

The plaintiffs base their claim of unconstitutionality of the ordinance on several reasons. Firstly, it is alleged that the ordinance violates their rights of free speech under the First Amendment. As well, it denies them of their property without due process of law and further denies them of their right to freely acquire, own, and alienate property guaranteed by the Ninth Amendment. In addition, plaintiffs claim that the ordinance bears no relation to the public health, safety and welfare and finally, it denies plaintiff Mellman the constitutional right to pursue his lawful business, as guaranteed by the Ninth Amendment.

The defendant, however, contends that the ordinance is a proper exercise of the police power and results in no denial of due process. In support of this argument, the Township submits that the aim of the ordinance was to

preclude "panic selling", a situation which often results when numerous "For Sale" signs appear in a given locale, aggravating fears of white residents that their neighborhood may be undergoing a total racial transformation. *DeKalb Real Estate Board v. Chairman and Board of Commissioners of Roads and Revenues for DeKalb County,* 372 F. Supp. 748 (N. D. Ga. 1973).

An ordinance of the city of Gary, Indiana which prohibited the display of "For Sale", "Sold", or similar signs in residential areas was upheld as reasonable where it was clearly apparent that the proliferation of the "For Sale" signs resulted in a tendency to provoke panic selling. *Barrick Realty, Inc. v. City of Gary, Indiana,* 354 F. Supp. 126 (N. D. Ind. 1973), *affirmed* 491 F. 2d 161 (7th Cir. 1974).

The Court stated:

> "The potential public benefit from the ordinance far outweighs the harm to realtors and homeowners who wish to use 'For Sale' signs. The additional expense or delay which might result from having to use alternative means of advertising is minimal." 354 F. Supp. at 136.

Thus, an ordinance similar to the one in question here has been held to be a reasonable exercise of the police power. However, the history of the Gary ordinance shows that its purpose was to halt resegregation.

> "It was passed in response to the presence of numerous 'For Sale' signs in some white neighborhoods, which caused whites to move *en masse* and blacks to replace them. There is evidence in the record that some real estate brokers who placed these signs (not including any plaintiffs) actively encouraged resegre-

gation by unlawfully urging whites to sell quickly before they had black neighbors and lower property values." 491 F. 2d at 163.

With due deference to the reasoning of the *Barrick* court, on the facts before the court there, it appears that the true thrust of these sign ordinances is to promote a racial balance or more properly, a racial imbalance in order to perpetuate existing racial lines.

There can be no doubt that this is precisely the result desired by the Willingboro Town Council in adopting this ordinance. However, the key distinction between Willingboro and Gary, Indiana is that in Gary the stimulus and response were easily observable. As "For Sale" signs appeared, whites disappeared from the city *en masse*. Yet in Willingboro, there exists no evidence of similar patterns. Rather, there is merely an indication that its residents are concerned that there may be a large influx of minority groups moving in to the town with the resultant effect being a reduction in property values. This fear of declining property values, however, although very real to property owners in Willingboro, is not and cannot be the concern of this court when it results in an abridgement of constitutional rights.

In spite of its decision, the Seventh Circuit in *Barrick* recognized that "the very purpose of the ordinance is censorial. First Amendment as well as commercial interests are therefore affected by this ordinance". 491 F. 2d 161 at 164.

The Supreme Court has held that reasonable regulations upon commercial communications do not fall within the purview of the First Amendment. *Valentine v. Chrestensen*, 316 U. S. 52 (1942). The situation, however, with which the court is presented here results in nothing less than censorship by denying property owners of a very important means by which they may communicate to others that their property is for sale. In light of testimony from plaintiff Mellman that approximately thirty percent of inquiries to his office are a result of "For Sale" signs being posted on residences, it is apparent that the ordinance brings about a serious denial of a property owners right to freely and reasonably express to others the desire to sell in violation of the First Amendment.

Even more important is the concomitant result: one who wishes to purchase a home in Willingboro has no way of learning what is available. He only has the "option" of choosing a home from those which he is shown by a realtor, thereby necessitating the use of a real estate brokerage firm. Further, the broker or salesman may be very selective in choosing which home he wishes to show a potential buyer. This fact along with the purported "purpose of the ordinance—'stabilization of neighborhoods'—may have the ultimate effect of freezing in past discrimination, denying blacks a fair opportunity to find suitable housing". *DeKalb Real Estate Board, supra.*

Thus, this circumstance leads to the natural conclusion that in its application the Willingboro ordinance results in an infringement upon the fundamental right to travel, *Shapiro v. Thompson*, 394 U. S. 618 (1969), a right which may not be abridged absent a compelling State interest. *Wellford v. Battaglia*, 343 F. Supp. 143 (D. Del. 1972), *affirmed* 485 F. 2d 1151 (3d Cir. 1973). Travel, in this sense, refers to migration with intent to settle and abide, not mere movement. *Wellford, supra*, 343 F. Supp. 143, 147 n. 9.

Yet in view of the opportunity that realtors in Willingboro have to utilize the ordinance to arbitrarily regulate the racial and ethnic development of a particular residential area, there is abundant evidence of potential inter-

ference with the right to travel, a right which applies to intrastate as well as interstate migration. *Id.* at 147.

Although municipal ordinances are clothed with a presumption of validity, *Roe v. Kervick*, 42 N. J 191 (1964), the exercise of a municipality's police power in enacting an ordinance must be through reasonable means substantially connected with the public interest designed to be advanced. *Moyant v. Paramus*, 30 N. J. 528 (1959).

Although this court does not doubt that Willingboro adopted its ordinance for what the Town Council felt was a valid purpose, legitimate legislative goals cannot be pursued by means which broadly stifle fundamental liberty when the end can be more narrowly achieved. *Shelton v. Tucker*, 364 U. S. 479 (1960).

The goal here of alleviating problems of panic selling is meritorious. However, the means employed are not. Therefore, the ordinance must not be allowed to stand when as applied, it enables a realtor, a private citizen, to be the only one capable of apprising a potential buyer of the status of the real estate market. It is he alone who is aware of those homes which are listed for sale. The buyer is forced to seek him out, no longer being able to merely assess a particular residential area in a community to ascertain for himself the homes which are available. What follows is to place each purchaser at the whim of the realtor, enabling him, if he so desires, to stimulate and prey on racial bigotry and fear to create or perpetuate ghettos.

Such a result, accomplished through the action of a municipal governing body, cannot be tolerated. This court, following a full hearing, therefore determines Ordinance No. 5-1974 of Willingboro Revised General Ordinances to be unconstitutional.

Plaintiff will submit an appropriate order.

Dated: February 20th, 1975

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 75-1448.

LINMARK ASSOCIATES, INC., AND
WILLIAM MELLMAN

v.

THE TOWNSHIP OF WILLINGBORO AND
GERALD DALY,

Appellants

(D. C. Civil Action No. 74-1120)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Present: GIBBONS, *Circuit Judge*, MARKEY,* *Chief Judge of Customs and Patent Appeals* and WEIS, *Circuit Judge.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 6, 1975, be, and the same is hereby reversed. Costs taxed against appellees.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

April 28, 1976

Costs taxed in favor of appellants as follows:

Brief	$ 317.50
Appendix	3,253.50
Clerk's Fees	50.00
TOTAL	$3,621.00

Certified as a true copy and issued in lieu of a formal mandate on June 22, 1976.

Test:

THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

• Sitting by designation.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 75-1448.

LINMARK ASSOCIATES, INC. AND
WILLIAM MELLMAN,
Plaintiffs-Appellees

v.

THE TOWNSHIP OF WILLINGBORO, AND
GERALD DALY,
Defendants-Appellants

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS, GARTH, *Circuit Judges* and MARKEY, *Chief Judge of Court of Customs and Patent Appeals.*

The petition for rehearing filed by Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Chief Judge Seitz and Judge Gibbons would grant the petition for rehearing in banc.

By THE COURT

JOSEPH F. WEIS, JR.
Judge

Dated: June 11, 1976

Supreme Court, U. S.
FILED
DEC 7 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-357.

LINMARK ASSOCIATES, INC. and WILLIAM MELLMAN,
Petitioners,

v.

THE TOWNSHIP OF WILLINGBORO and GERALD DALY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1976
CERTIORARI GRANTED NOVEMBER 8, 1976.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
Relevant Docket Entries	A1
Petitioner's Complaint Filed July 24, 1974	A2
Respondent's Answer Filed August 20, 1974	A6
References to Following Proceedings in the U. S. District Court	A7
Transcript of Evidence at Trial	A7
Opinion, Fisher, J.	A7
Order for Judgment	A7
Notice of Appeal	A7
References to the Following Proceedings in the U. S. Court of Appeals for the Third Circuit	A8
Opinion, Markley, C. J.	A8
Opinion, Gibbons, C. J., Dissenting	A8
Judgment	A8
Denial of Rehearing	A8
Order Granting Certiorari	A9
Ordinance in Issue:	
Before Amendment	A10
Amendment	A23

RELEVANT DOCKET ENTRIES.

District Court.

July 24, 1974 Complaint.

Aug. 20, 1974 Answer.

Feb. 20, 1975 Opinion.

Mar. 6, 1975 Order for Judgment.

Mar. 24, 1975 Notice of Appeal.

Court of Appeals.

Apr. 28, 1976 Opinion.

Apr. 28, 1976 Judgment.

June 11, 1976 Rehearing denied.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

—

CIVIL ACTION No. 74-1120.

—

LINMARK ASSOCIATES, INC.
and WILLIAM MELLMAN,

Plaintiffs,

v.

THE TOWNSHIP OF WILLINGBORO,
and GERALD DALY,

Defendants.

COMPLAINT.

(Filed July 24, 1974)

Plaintiffs, Linmark Associates, Inc., a New Jersey corporation having a place of business at 529 Market Street, Camden, New Jersey, and William Mellman, of Mellman Realtors, having a place of business at 407 U. S. Highway No. 130, Cinnaminson, New Jersey, by way of Complaint against the defendants, say:

1. The jurisdiction of this Court is based upon 28 U. S. C. A. 1343(3), and the matter being an actual controversy within the jurisdiction of the Court, it is further brought pursuant to 28 U. S. C. A. Section 2201.

2. Plaintiff, Linmark Associates, Inc., is the owner of land and premises known as 25 Sherwood Drive, Township of Willingboro, Burlington County, New Jersey. These premises are presently listed for sale pursuant to a normal

brokerage listing agreement with plaintiff, William Mellman, of Mellman Realtors.

3. Plaintiff, William Mellman, of Mellman Realtors is a duly licensed real estate agent and brokerage firm engaged in the sale of real estate in the State of New Jersey, including the Township of Willingboro, Burlington County.

4. Defendant, Township of Willingboro, is a municipality of the State of New Jersey organized pursuant to the "Faulkner Act," N. J. S. A. 40:69a-1 et seq.

5. Defendant, Gerald Daly, is the building inspector of the Township of Willingboro, and is the Township official charged with the enforcement of the ordinance which is the subject matter of this litigation.

6. On March 18, 1974, the Township Council of the Township of Willingboro passed, on second reading, Ordinance No. 5-1974, which Ordinance amended Chapter 17 (Signs) of the Revised General Ordinance of the Township of Willingboro.

7. Ordinance No. 5-1974 amended Chapter 17 of the Revised General Ordinances of the Township of Willingboro by deleting Section 17-6.5 thereof.

8. Section 17-6.5 formerly provided for the placement on properties in a residential zone of signs pertaining to the lease, rental or sale of the premises on which they appeared, subject to specific regulations as to size, location on premises, and the time period during which that display was permissible.

9. The effect of the enactment of Ordinance No. 5-1974 is to unequivocally prohibit the placement of any signs pertaining to the lease, rental, or sale of the premises

upon any property in the Township of Willingboro by any person.

10. Said Ordinance thus prohibits the placement of a "For Sale" sign upon the premises owned by plaintiff, Linmark Associates, Inc., by Linmark Associates, Inc. personally, or by Mellman Realtors upon its own volition or at the request of Linmark Associates, Inc.

11. Ordinance No. 5-1974 is unconstitutional in that it deprives and infringes upon both plaintiffs' rights of free speech guaranteed to them under the First and Fourteenth Amendments to the Constitution of the United States and Paragraph 6 of Article 1 of the Constitution of the State of New Jersey.

12. Ordinance No. 5-1974 is further unconstitutional in that it denies plaintiffs of their property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Paragraph 20 of Article 1 of the Constitution of the State of New Jersey.

13. Ordinance No. 5-1974 is further unconstitutional in that it unlawfully discriminates against the plaintiffs and denies the plaintiffs due process and equal protection under the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

14. Ordinance No. 5-1974 is further unconstitutional in that it denies to the plaintiffs their right to freely acquire, own and alienate property guaranteed to them by the Ninth and Fourteenth Amendments to the Constitution of the United States and Paragraph 1 of Article 1 of the Constitution of the State of New Jersey.

15. Ordinance No. 5-1974 is further unconsitutional in that it bears no relationship to the public health, safety

and welfare and is in derogation of the police power and an abuse of the enabling legislation under whcih it is promulgated.

16. Ordinance No. 5-1974 is unconstitutional in regard to plaintiff, Mellman Realtors, specifically in that it denies to plaintiff, Mellman Realtors, the constitutional right to pursue its lawful business guaranteed by the Ninth and Fourteenth Amendments to the Constitution of the United States.

17. Ordinance No. 5-1974 is unconstitutionally overbroad.

WHEREFORE, plaintiffs demand Judgment

A. Declaring Ordinance No. 5-1974 of the Township of Willingboro unconstitutional and void;

B. Preliminarily and permanently enjoining and restraining defendant, Gerald Daly, from enforcing said Ordinance;

C. Such other relief as the interests of justice require; and

D. Costs.

ARCHER, GREINER & READ,
Attorneys for Plaintiffs,
Linmark Associates, Inc. and
William Mellman.

[Caption omitted in printing. Same as Complaint.]

ANSWER.

(Filed August 20, 1974)

Defendants, the Township of Willingboro, a muncipal corporation of the State of New Jersey, and Gerald Daly, both with offices at the Municipal Complex, Salem Road, Willingboro, New Jersey, by way of Answer say that:

1. Defendants admit the allegations of jurisdiction contained in Paragraph 1 of the Complaint.

2. Defendants have insufficient information concerning the allegations of Paragraphs 2 and 3 of the Complaint, and leave Plaintiffs to their proofs.

3. Defendants admit the allegations of Paragraphs 4 through 10, inclusive.

4. Defendants deny the allegations of Paragraphs 11 through 17, inclusive.

FIRST SEPARATE DEFENSE.

The Constitutional guarantees of free speech are not applicable to a commercial situation which the present case involves.

SECOND SEPARATE DEFENSE.

The subject ordinance is a proper exercise of the police power and is reasonably related to the object sought to be obtained and is, thus, not a denial of due process.

THIRD SEPARATE DEFENSE.

The subject ordinance merely restricts the means of acquiring and alienating real property and do not preclude either.

KESSLER, TUTEK & GOTTLIEB,
Attorneys for Defendants.

REFERENCES TO PROCEEDINGS IN THE U. S. DISTRICT COURT.

The transcript of evidence at the trial in the U. S. District Court is printed in full in the Joint Appendix (filed as part of the record herein) in the Court of Appeals pages 14a to 128a of which contain the exhibits and pages 129a to 261a of which contain the transcript of hearing.

The opinion of Judge Fisher in the District Court is printed in full in the Petition For A Writ of Certiorari herein as Appendix B thereto.

The Order for Judgment is printed in full in the Joint Appendix (filed as part of the record herein) in the Court of Appeals at page 12a, as is the Notice of Appeal at page 13a.

REFERENCES TO PROCEEDINGS IN THE U. S. COURT OF APPEALS FOR THE THIRD CIRCUIT.

The opinion of Chief Judge Markey (majority) is printed in full in the Petition For a Writ of Certiorari herein as Appendix A (pp. 2 to 32).

The opinion of Chief Judge Gibbons (dissenting) is printed in full in the Petition For A Writ of Certiorari herein as Appendix A (pp. 33 to 55).

The Judgment in the Court of Appeals is printed in full in the Petition For A Writ of Certiorari herein as Appendix C, as is the denial of rehearing as Appendix D.

IN THE
SUPREME COURT OF THE UNITED STATES

—

No. 76-357

—

OCTOBER TERM, 1976

—

ORDER.

November 8, 1976

The petition for a writ of certiorari is granted.

SIGN ORDINANCE OF TOWNSHIP BEFORE AMENDMENT BY ORDINANCE NO. 5-1974.

(Admitted as P-1 in evidence)

CHAPTER XVII

SIGNS*

17-1 Regulation of the Erection and Maintenance of Signs.

17.1.1 *Definitions.* As used in this chapter, unless the context otherwise indicates, the following words and terms shall have the meanings given herein:

a. "Signs" shall mean and include every sign, billboard, ground sign, wall sign, roof sign, sign painted on the exterior surface of a building structure, illuminated sign, projecting sign, temporary sign, flag, pennant and badge, and shall likewise include any announcement declaration, demonstration, display illustration or insignia used to advertise or promote the interest of any person, firm or corporation when the same is placed either indoors or out of doors in such a way that the same is in view of the general public.

b. "Sign" shall not mean or include any flag, badge or insignia of any public, quasi-public, civic, charitable or religious group, nor shall it mean or include the flags of the United States of America or the State of New Jersey.

c. "Sign area" or "area of sign" shall mean and refer to the area included within the edges of the sign or within the outer edges of any frame attached thereto, whichever is greater. Where the sign has no clearly defined frame

* The power to regulate signs is derived from the general power to adopt local police ordinances of all kinds, contained in the Charter, R. S. 40:69A-29, 30.

or edge, the "sign area" or "area of a sign" shall be defined by and in terms of the four sides (straight sides) which most closely outline such sign or frame. In no case, however, shall the area of the frame exceed 25 per cent of the total "sign area" or "area of the sign." All signs attached to the outside windows or permanently attached to the inside of windows or glass or the inside of the building in such a way as to be placed within three feet of said windows or glass shall be considered as a part of the total allowable sign area for any structure or use. Furthermore, no combination of permanent signs or temporary signs as defined in this chapter, whether inside or outside of the structure in question, shall cover more than 50 per cent of the glass area of any structure up to a height of six feet.

d. "Side." Where a sign is applied or attached to any facade of a brick or masonry wall which comprises a part of an integral and decorative entrance or gateway from a public highway, street, or road, which entrance is at least six feet wide, each such facade shall be considered one side of a single sign, notwithstanding the fact that such walls may be structurally independent and separate.

17-2 Legality.

Signs may be erected and maintained in the Township of Willingboro only when the same comply with the provisions of this chapter, and it shall be unlawful to erect or maintain any sign at any place within the said Township of Willingboro when the same does not comply with the provisions of this chapter.

17-3 Permit Required.

No sign which exceeds two square feet in area nor any sign of any size which would cover up to 50 percent

of glass area of part of the interior-exterior of a structure shall be erected, maintained, removed, altered or repaired until a permit for the same has been issued by the department of inspections.

17-3.1 *Application for Fermit.* The aforementioned permit shall be issued only upon a written application for the same directed to the township building inspector. Said application shall contain the following information.

a. The name, address and telephone number of the applicant.

b. The location of the property upon which the sign is to be situated.

c. The position of the sign in relation to nearby buildings and structures.

d. The name of the person who will erect, maintain, remove, alter or repair the sign.

e. Such other information as shall be necessary, in the opinion of the township building inspector, to assure under the circumstances full compliance with this chapter and all other ordinances of the township.

f. No person, partnership, corporation or business entity shall erect, construct, maintain or alter or cause to be erected, constructed, maintained or altered any signs unless a permit for same has been issued by the building inspector. No artisan, mechanic or contractor shall perform any work requiring a sign permit unless he has first satisfactorily determined that such a permit has, in fact, been issued for such work. Any such artisan, mechanic or contractor who performs any work for which such a permit has not been issued, shall be deemed in violation of this chapter and shall be subject to the penalties set forth in section 3-1.

17-4 Fees.

17-4.1 *Application Fee.* Each application shall be accompanied by a fee of ten ($10.00) dollars, except for those signs which are authorized and permitted pursuant to subsections 17-6.3 and 17-6.5 or pursuant to section 17-9 of this chapter.

17-4.2 *Licensing Fee.* In addition to the aforementioned application fee, there shall be an additional annual licensing fee of five ($5.00) dollars payable on the second day of January of each calendar year for each sign permitted to exist in a business or industrial zone by the terms of this chapter.

17-5 Appeals.

All appeals from the denial of the aforesaid permits shall be processed by and before the Willingboro Township zoning board of adjustment according to the procedures set forth in the appropriate ordinance governing said body.

17-6 Residential Zones.

The following signs are permitted in those areas of the Township of Willingboro which have been zoned for residential use.

17-6.1 *Nameplate or Identification Signs.* Nonilluminated nameplate and/or identification signs which indicate the name and/or street number of the principal occupant of the premises and which do not exceed 72 square inches in total area. Said signs shall be in all cases situated within the property lines and only one such sign per dwelling unit shall be permitted.

17-6.2 *Professional Signs.* Professional signs bearing the name of the professional person residing on the prem-

ises and identifying his profession which do not exceed 240 square inches in area. Not more than one such sign is to be placed upon any property without the written permission of the township building inspector.

17-6.3 *Non-Business Usage.* Signs advertising a use in a residential zone, such as a clubhouse, a church, a school, a hospital, a branch of the municipal government or a similar public or quasi-public building devoted to a non-profit use, but not including any activity of a retail business nature, provided that said sign is located on the same premises as the use it advertises. No such sign shall exceed 64 square feet on any one side, and no more than two such signs may be placed upon any property.

17-6.4 *Specific Recreational Activities.* Signs advertising a golf course, country club, private swimming club, marina, tennis court, equestrian trail, private stable or related open area, provided that such sign is located on the same premises which it advertises. No such sign shall exceed 64 square feet on any one side, and no more than two such signs will be placed upon the property.

17-6.5 *Rental Signs.* Signs pertaining to the lease, rental or sale of the premises on which they appear, subject to the following conditions:

a. The size of the sign shall not exceed eight square feet in area.

b. The sign shall be located upon the premises to which it pertains and shall not project beyond the property line of such premises.

c. Such signs shall be removed within five days after the execution of any lease, rental agreement or agreement of sale for the premises in question by the occupant of the premises and/or the owner of the sign.

d. Not more than two such signs are to be placed upon any property.

17-6.6 *Height Limitation.* No sign permitted in a residential zone pursuant to the provisions of this section shall exceed ten feet in height as measured from the adjacent grade level.

17-7 Business and Industrial Zones.

The following signs are permitted in those areas of the Township of Willingboro which have been zoned for business and/or industrial use:

17-7.1 *Specified Residential Zone Signs.* Any sign permitted to exist in a residential zone under the provisions of section 17-6 preceding.

17-7.2 *Illuminated or Non-Illuminated Business Signs.*

a. Illuminated or non-illuminated business signs which shall be applied or attached to the facades of a building and which shall not project more than 15 inches from the facade on which or in front of which it is displayed, nor extend above the uppermost edge of such facade.

b. Where a permanent structure comprises an integral and decorative part of the total design of a building or shopping center site approved by the township planning board, an illuminated or non-illuminated business sign may be attached to the facade of the structure, provided that it does not project more than 15 inches from the facade on which or in front of which it is displayed, nor extend above the uppermost edge of the facade.

c. One exterior business sign shall be permitted to be applied or attached to a facade of any building or structure employed for any permissible business or industrial

use if there is located within said facade a customer entrance to said building which is at least six feet wide, but the size of each said sign shall in no event exceed in area 15 per cent of the over-all area of the facade of the building on which said sign is displayed.

17-7.3 *Free Standing Signs.* Free standing signs shall be permitted but only if erected on the same premises on which the business to which they refer is conducted. Such signs shall likewise conform to the following provisions relating to their number and size.

a. In a shopping center or industrial park there may be one directory sign at any location therein which shall not exceed five square feet on one side for each acre of land in such shopping center or industrial park and at each point of entrance and exit for vehicular traffic shall not exceed two square feet on one side for each acre of land in such shopping center or industrial park. In the interior of a shopping center or industrial park, containing more than one building, there may be one directory sign not exceeding eight square feet on one side for each building unit therein.

b. In a shopping center having walkways roofed over with a permanent rigid canopy or other such structural device, there may be one illuminated or non-illuminated sign for each structure or occupant in such shopping center, hanging from the underside of the canopy and not exceeding eight square feet on one side.

c. In all other business and industrial areas there may be not more than three free standing signs, the combined areas of which shall not exceed 64 square feet on any one surface. For purposes of this chapter, a free standing sign shall be limited to two parallel advertising surfaces attached to each other and each having the same area, which shall not exceed 64 square feet on any one surface.

d. No free standing sign shall be erected in the Township of Willingboro which exceeds a height of 25 feet.

e. Off-premises free standing directional signs along U. S. Route 130 or any main (i.e., major) arterial streets or roads which intersect U. S. Route 130 and are in a primary business zone for the uses specified under subsections 17-6.3 and 17-6.4 hereof, not to exceed two in number for any such use and not to exceed 64 square feet on any one side.

f. In any area in which such a sign is permitted to be erected or to exist, all refuse and papers shall be kept constantly removed from the ground spaces at least five feet in all directions around the sign, and vegetation shall be kept trimmed so as not to exceed a height of six inches.

17-8 Traffic Signs.

Free standing traffic directional signs which are necessary to control and regulate the movement of traffic on the interior roadways and in the parking areas of the community may be erected; provided, however, that the number and location of such signs have been recommended by the township manager and approved by the planning board as part of a detailed site plan for the area or premises in question; and provided, further, that the signs in question are deemed by the township manager to be essential to traffic safety. Such signs, where permitted, shall not exceed four square feet in area and shall not exceed a height of ten feet, except that when such directional signals are located at any point of entrance or exit vehicular traffic in a shopping center or industrial park, this section shall not apply.

17-9 Township Limit Signs.

Official munipical signs designating the corporate limits of the Township of Willingboro may be erected, but the same shall not exceed 64 square feet on one side.

17-10 Temporary Signs.

17-10.1 *Model Homes.* The township building inspector shall be and hereby is empowered to issue permits for the erection of the following temporary free-standing signs pertaining to the sale and advertisement of model homes within the township in accordance with the requirements and standards hereinafter specified:

a. On-premises signs not to exceed three in number for each model home, none of which shall exceed eight square feet in area on any one side.

b. Signs, not to exceed two in number, within 100 feet of an entrance to or exit from a model home site, neither of which shall exceed 64 square feet in area on any one side.

c. Off-premises free standing signs along U. S. Route 130 or any main (i.e., major) arterial streets or roads which intersect with U. S. Route 130 and which are in a primary business zone, not to exceed two in number for any model home site, neither of which shall exceed 64 square feet in area on any one side for each model located in the model home site to which it pertains, and in no event to exceed a total of 300 square feet per sign.

d. Directional signs along main (i.e., major) arterial streets or roads not to exceed more than one sign on either side of the road, per each 1,000 linear feet, none of which shall exceed 16 square feet in area on any one side, nor be located nearer than 100 feet to any existing building

or other occupied structure, unless suitably landscaped with dense shrubbery so as to completely shield such sign from any dwelling or structure.

e. None of the foregoing signs set forth in any portion of this subsection shall be erected more than 30 days before the actual opening of the model home or model homes to which they pertain, and each and every such sign must be moved by the applicant or by the owner of the property upon which the same were erected within five days after the closing of any such model home or model homes. In order to insure a prompt removal in the latter event, the building inspector may require as a condition of the granting of any such temporary sign permit a bond, cash deposit or other performance guarantee, in an amount adequate to cover all costs incident to the removal of the same by the township, in such form as shall be satisfactory to the township attorney.

17-10.2 *Construction Sites.* The building inspector shall be and hereby is empowered to issue permits for temporary signs at a construction site which list the contractors, architects and other professional persons associated with said construction project. The maximum size of any such sign shall be 64 square feet and said sign must be removed within three weeks after the building is occupied by either the occupant of the property or the owner of the sign.

17-10.3 *Special Sales.* The department of inspections shall be and hereby is empowered to issue permits for temporary signs designed to promote special sales or other special promotion activities within the community. Each applicant shall be permitted to erect only one such sign on each permit granted and the sign shall not exceed 32 square feet in area. No more than four of the permits may

be issued to any one person, firm or corporation during any calendar year, unless the person, firm or corporation maintains more than one business location in the township. No sign erected pursuant to a permit issued under this section may be lawfully maintained for any period in excess of two weeks from the date on which the permit is issued. The permit fee for all signs issued pursuant to this paragraph shall be two ($2.00) dollars, rather than the permit fee prescribed for all other signs by section 17-4 of this chapter.

17-10.4 *Special Events.* The building inspector shall be and hereby is empowered to issue permits for the erection of temporary signs for and in connection with other special events in the community. Any such sign shall be removed by the applicant or by the owner of the property upon which the same is erected within five days after the event in question has taken place.

17-11 General Provisions.

In addition to the foregoing provisions, the following regulations shall govern the erection, placement and removal of signs in the Township of Willingboro.

17-11.1 *Flashing Signs.* No flashing, moving or reflective signs of any type may be erected anywhere within the corporate limits of the Township of Willingboro.

17-11.2 *Obstruction of Traffic Signals.* No signs shall be so placed as to impede or interfere in any way with the operation of a traffic light, traffic directional signal or general traffic vision.

17-11.3 *Relation of Signs to Business on Premises.* In order to preserve the basically residential character of this community and to facilitate the improvement of its business and industrial areas in a safe and orderly manner, no

commercial outdoor advertising signs, billboards or other signs which are not expressly and directly related to the business being conducted on the premises on which they are located and which are not expressly validated elsewhere in this chapter shall be permitted, and all such signs, as well as all other signs which do not conform to the specific requirements and standards set forth in this chapter, are specifically prohibited.

17-11.4 *Removal of Signs.* Any sign now or hereafter existing which no longer advertises a bona fide business being conducted on the premises shall be removed from said premises by the owner of record or beneficial user of the premises within ten days from the receipt of a written order to do so from the township building inspector. In default of said removal, the township manager is authorized to effectuate the removal of said sign and to charge all costs incident to the same to either the owner of record or the beneficial user of the premises, or to both, provided that there shall be no duplication of the payment of said costs.

17-11.5 *General Welfare.* If at any time the township manager shall determine that any sign in the Township of Willingboro constitutes a menace to the health, safety, morals or general welfare of the community, he shall notify the record owner and the beneficial user of the premises on which said sign is located by serving a written notice upon him, together with a written notice of demand that the condition be remedied within ten days from the receipt of said notice and demand. If the condition is not so remedied, the township manager shall undertake the necessary steps to rectify the same, charging all the costs incident to said efforts to either the record owner or the beneficial user of the premises, or both, provided that there shall be no duplication of the payment of said costs.

17-12 Non-Conforming Signs.

Any presently existing sign which was legally erected and legally maintained under the terms of the ordinance regulating the same in effect at the time of its erection but which does not conform to the provisions of this chapter may continue to exist at its present location, but said sign shall not be altered, rebuilt, enlarged or extended unless such action is directed at and does, in fact, effect the creation of a conforming use.

The failure to keep a non-conforming sign in good repair for a period of one year shall constitute an abandonment of the same, and said sign will then be removed by the township building inspector.

ORDINANCE NO. 5-1974.

(Admitted as P-2 in evidence)

NOTICE
TOWNSHIP OF WILLINGBORO
ORDINANCE NO. 5, 1974

AN ORDINANCE TO AMEND CHAPTER 17 (SIGNS) OF THE REVISED GENERAL ORDINANCE OF THE TOWNSHIP OF WILLINGBORO

BE IT ORDAINED by the Township Council of the Township of Willingboro, as follows:

SECTION 1. Section 17-6.5 of the Revised General Ordinances is hereby repealed.

SECTION 2. Section 17-6.6 of the Revised General Ordinances shall be renumbered to be Section 17-6.5.

SECTION 3. All Ordinances or parts of Ordinances inconsistent with the provisions hereof are, to the extent of such inconsistency, hereby repealed.

SECTION 4. This Ordinance shall take effect upon final adoption and publication in the manner prescribed by law.

Supreme Court, U. S.
FILED
OCT 13 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-357

LINMARK ASSOCIATES, INC. and
WILLIAM MELLMAN,

Petitioners,

v.

THE TOWNSHIP OF WILLINGBORO and
GERALD DALY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

MYRON H. GOTTLIEB,
KESSLER, TUTEK AND GOTTLIEB
325 Farnsworth Avenue,
Bordentown, New Jersey 08505
Counsel for Respondents

MICHAEL RODAK, JR., CLERK
OCT 13 1976
FILED
Supreme Court, U. S.

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

INDEX

Opinions Below 1
Jurisdiction 1
Question Presented 2
Constitutional Provisions and Ordinance Involved 2
Statement 2
Argument 7
I. The Decision Below is Clearly Correct 7
II. There is No Conflict of Decision 9
Conclusion 13

CITATIONS

CASES CITED:

Barrick Realty, Inc. v. City of Gary, Indiana,
491 F.2d 161 (7 Cir. 1974) 12

Bigelow v. Virginia,
421 U.S. 809 (1975) 7, 9

Branzburg v. Hayes,
408 U.S. 665 (1972) 8

Levitt and Sons, Inc. v. Division Against Discrimination in the State Department of Education,
31 N.J. 514, 158 A.2d 177 (1960), appeal dismissed, 363 U.S. 418 (1960) 2, 8

Metropolitan Housing Development Corporation v. Village of Arlington Heights,
517 F.2d 409 (7 Cir. 1975), cert. granted, 423 U.S. 1030 (1975) 8

Otero v. New York City Housing Authority,
484 F.2d 1122 (2 Cir. 1973) 11

United States v. Bob Lawrence Realty, Inc.,
474 F.2d 115 (5 Cir. 1975), cert. denied,
414 U.S. 826 (1973) 10

United States v. Hunter,
459 F.2d 205 (4 Cir. 1972), cert. denied,
409 U.S. 934 (1972) 10

STATUTES CITED:

42 U.S.C. §3601 et seq. 9

42 U.S.C. §3604 3

N.J.S.A. 10:5-1 et seq. 9

N.J.S.A. 10:5-10 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-357

LINMARK ASSOCIATES, INC. and
WILLIAM MELLMAN,

Petitioners,

v.

THE TOWNSHIP OF WILLINGBORO and
GERALD DALY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Appendix B of Petition) is unreported. The opinion of the Court of Appeals for the Third Circuit, and the dissenting opinion (Appendix A of Petition) are reported at 535 F.2d 786.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether a municipal ordinance prohibiting "for sale" and "sold" signs in residential districts, in an attempt to counteract a fear psychology and inhibit panic-selling in a community which is fully integrated in its housing pattern, is a violation of the First Amendment right of free speech where other means to advertise the proposed and/or consummated sale of a home exist and the effect of the ordinance is the minimum intrusion possible to accomplish the purpose?

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The Constitutional provisions and ordinance involved are adequately set forth in the Petition.

STATEMENT

Willingboro Township is a community of approximately 45,000 residents located in Burlington County, New Jersey. (Jt. App. 128a). Its residential development commenced in the late 1950's and is attributable mainly to Levitt and Sons, Inc. In the early years of development, Levitt refused to sell its homes to minority group members. This racially-based housing discrimination was enjoined by the New Jersey Supreme Court. *Levitt and Sons, Inc. v. Division Against Discrimination in the State Department of Education*, 31 N.J. 514, 158 A.2d 177 (1960), appeal dismissed, 363 U.S. 418 (1960). After the conclusion of that litigation, Levitt instituted a policy of actively encouraging the development of the Township as an integrated community (Jt. App. 182a). As a result, there is a totally integrated housing pattern in Willingboro. While development of the Township proceeded sequentially through ten different areas or "parks" (i.e., Millbrook Park, Buckingham Park, Garfield Park, etc.), no park can be denominated a white section, a black section or a Spanish-speaking section, each park having members of almost all racial and ethnic groups living together. (Jt. App. 183a; 214a). As indicated in the decision below, "a close approach was achieved to that housing ideal sought by fair-minded citizens, mandated by the federal Fair Housing Act, 42 U.S.C. §3604, and impelled by our Constitution." 535 F.2d at 789.

However, in the late 1960's, racial problems and conflict surfaced. In response, the Township Council, pursuant to *N.J.S.A.* 10:5-10, created the Willingboro Human Relations Commission, which is statutorily charged with attempting "to foster through community effort or otherwise, good will, cooperation and conciliation among the groups and elements of the inhabitants of the community" and which was empowered by Township Council "to make recommendations to [Township Council] for the development of policies and procedures in general and for programs of formal and informal education that will aid in eliminating all types of discrimination based on race, creed, color, national origin, ancestry, age, marital status or sex." The Township also became a member of National Neighbors, an organization promoting integrated housing and discussing the various problems arising from this. (Jt. App. 183a).

Since Willingboro's population has been to a certain extent transient (being close to several military installations) and because over eighty realtor's offices competed for the sale of homes in the Township, which had a uniformity in home construction, the proliferation of "for sale" and "sold" signs helped to create the impression that many people were leaving the community. (Jt. App. 233a).

As a result, a fear psychology developed among many home owners. One Councilman described this as:

> ". . . people in the community were expressing a desire to sell their homes and move to other areas of Burlington County because what they sensed was a lack of stability or a large turnover in the community, and that this large turnover was resulting in a substantial influx of minority groups into the community beyond what could be sustained without the community itself turning into a ghetto within the county.
>
> "People would indicate that: 'Everybody on my street is moving. I've got to get out of this town before it's too late.'
>
> "People would express a concern of: "with all the turnover, my property value is going to go down. I got to get out.'" (Jt. App. 181a).

From a concern for the preservation of the well-integrated character of the community and a desire to counteract the growing fear psychology, the Human Relations Commission, after an investigation noting the increasing panic selling, recommended to Township Council the prohibition of "for sale" and "sold" sign in residential areas of the Township. This recommendation, as described by one Commission member, was one attempt to respond to the developing fear psychology:

> "I think the Commission would like to see a community which is as harmonious as it would choose to be without the kind of pressures, if I may use that term, which would induce people to sell when in fact they don't want to sell; and I think that's the thing that the ordinance was directed at.
>
> "Individuals were responding and reacting to a rash of signs, or, one sign which would lead to another, and another and another.

> "I think that's the concern the Commission was trying to address.
>
> "If the neighborhood was or is to be all black, and it that is a decision by choice, choice of the individuals involved, then the Commission I believe would have no concerns about that. But if neighbors, residents of the township are being pushed into this kind of thing by the presence of a sign or signs, then I think the Commissioner's concern would be that that ought not to be, this is not the free choice that people ought to exercise, should exercise." (Jt. App. 244a-245a).

Township Council investigated how similar ordinances had worked in other municipalities. It held two public hearings, one before and one after the drafting of the ordinance. (Jt. App. 186a). The ordinance under review was then adopted. Suit was commenced by a realtor and by a corporation owning a home in the Township. After a two day trial, the District Court for the District of New Jersey concluded that the ordinance was unconstitutional, holding that (1) "the ordinance brings about a serious denial of a property owners [sic] right to freely and reasonably express to others the desire to sell in violation of the First Amendment" and (2) "in its application the Willingboro ordinance results in an infringement upon the fundamental right to travel."

Upon appeal, the United States Court of Appeals for the Third Circuit reversed the District Court decision and upheld the constitutionality of the ordinance. That Court concluded that while commercial speech was entitled to First Amendment protection, in assessing and balancing the interests involved, "[t]he preservation of a desirable community impels a priority of the community's needs over commercial transactions in the community as they see fit, so long as those community needs are reasonably estab-

lished and the means chosen to meet them do not intringe upon the fundamental constitutional rights of individual businessmen." It then determined that "the limited denial occasioned by the ordinance herein [resulting] from a reasonable exercise of the police power in furthering the public welfare by forestalling panic selling and its offspring, segregation." Finally, the Court found that "[s]ellers are free to sell to any economically qualified buyer. Economically qualified buyers of any racial group are free to buy any home in any section of Willingboro. No burden on commerce or a deterring influence on the individual right to migrate has been shown."

A Petition for Rehearing en banc was denied and a timely Petition for a Writ of Certiorari followed.

ARGUMENT

The issue in this case is rather narrow, not warranting review by this Court on certiorari. This case does not seek to question whether commercial speech is to be afforded any protection under the First Amendment (all parties and the Courts conceed that is so) nor does this case inquire whether that First Amendment protection can be overridden by a compelling State interest (that is clear to all concerned.) Specifically, the question is a factual issue concerned with the sufficiency of proof of a compelling State interest to override the First Amendment.

While the question presented as phrased by Petitioners does refer, in addition to freedom of speech, to equal protection of the law and due process, no mention of either constitutional concept is made in the supporting Reasons for Granting the Writ. There is only one issue—one of fact as to the sufficiency of proof under a clearly articulated standard defining the scope of First Amendment rights—not justifying the granting of the Writ.

Clearly, the decision of the Court of Appeals was correct and there is no conflict of decision requiring review by this Court.

I. THE DECISION BELOW IS CLEARLY CORRECT

It is clearly-established that "speech is not stripped of its First Amendment protection merely because it appears in [the] form [of commercial speech]." *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975). However, it is similarly evident that "official action with adverse impact on First Amendment rights must be justified by a public interest that is 'compelling' or 'paramount'" nor "may it be achieved by unduly broad means having an unnecessary impact on pro-

tected rights of speech, press, or association." *Branzburg v. Hayes*, 408 U.S. 665, 680-1 (1972). The Township of Willingboro manifestly established a compelling State interest which was not overly broad in its impact. A brief review of the facts amply demonstrates this.

Willingboro, after the 1960 decision in *Levitt and Sons, Inc. v. Division Against Discrimination in the State Department of Education, supra.*, has actively worked on and put into practice the reality of full racial and ethnic integration in housing. (Jt. App. 182a-183a). Thus, viewed in an historical context, the action of Township Council cannot be presumed to be other than consistent with this positive approach to living in racial and ethnic harmony. See *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 517 F.2d 409, 414 (7 Cir. 1975), cert. granted, 423 U.S. 1030 (1975), as to the propriety of referring to an historical context in evaluating the discriminatory effect of a municipal decision.

It became quite evident to Township Council that there was a fear psychology developing based on the existence of "for sale" and "sold" signs. (Jt. App. 181a; 207a; 240a; 248a.) While Township Council believed this to be "an irrational reaction," Council also concluded that it had to act "to give people the feeling of stability so that they would not overreact to a particular situation." (Jt. App. 181a). It decided, upon recommendation of the Human Relations Commission and after investigation of a similar approach in a municipality in Ohio (Jt. App. 184a-185a), to prohibit "for sale" and "sold" signs in the residential areas of the Township. Although Willingboro was and had been fully integrated, Township Council concluded that the fear psychology might result in Willingboro metamorphosing from an integrated community to a ghetto (Jt. App. 182a). The decision was to "nip it in the bud and stop it now before too much of this got out of hand." (Jt. App. 207a).

Without question, the promotion and maintenance of integrated housing is of the highest public interest. See 42 U.S.C. §3601 *et seq.* (Fair Housing Act); *N.J.S.A.* 10:5-1 *et seq.* (Law Against Discrimination). Contrasted with this is the limited intrusion on the First Amendment right of free speech vis-a-vis commercial "for sale" signs. There can be no doubt that the minimal restriction on commercial speech, when balanced against the desire to eliminate a fear psychology as an impediment to the maintenance of integrated housing, must be sustained. Indeed, the efficacy of this statement is strengthened by the minimal aspect of the intrusion. Petitioner Mellman himself indicated in testimony that approximately seventy per cent of his real estate transactions were initiated other than through on-site "for sale" signs. (Jt. App. 135a). Advertisement and personal contact, the two other main areas in initiating real estate transactions, were not at all affected by the ordinance. In reality, real estate sales maintained their pre-ordinance level after the adoption of the ordinance (Jt. App. 170a). Thus, the sale of residences was not affected, only the means of sale and the reason for some owners wanting to sell. (Jt. Ap. 191a-192a). Clearly, there was no other approach to minimizing the fear psychology, than banning the "for sale" signs, that would have been as effective and yet would have as such a minimal interference in the process of selling homes. Council acted only to the extent necessary and in the paramount public interest.

II. THERE IS NO CONFLICT OF DECISION

In their Petition, Petitioners argue that this decision is at odds with *Bigelow v. Virginia*, 421 U.S. 809 (1975).

However, a careful comparison of the two decisions will reveal their consistency in philosophy, but certain critical differences in their factual context.

Jeffrey C. Bigelow, the managing editor of a newspaper in Virginia, had published an advertisement offering a source of information for the procuring of a legal abortion. A Virginia statute declared that one was guilty of a misdemeanor if he published or advertised the procuring of an abortion. Mr. Bigelow was convicted under this statute. This Court reversed the judgment of conviction, holding that the statute, as applied, infringed upon the First Amendment rights of Mr. Bigelow.

In the opinion delivered by Mr. Justice Blackmun, it was noted that:

> "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit." 421 U.S. at

In a footnote to this quoted sentence, reference was made to its consistency with certain other decisions, in which "there usually existed a clear relationship between the advertising in question and an activity that the government was legitimately regulating." In the case of Willingboro, the clear relationship obtains between the existence of the means of advertising (the signs), as opposed to their specific content, and the psychological fear (resulting in panic selling) which the Township legitimately could regulate. The footnote references to *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5 Cir. 1975), cert. denied, 414 U.S. 826 (1973), a case upholding a restriction on free speech in an antiblockbusting context, and *United States v. Hunter*, 459 F.2d 205 (4 Cir. 1972), cert. denied, 409 U.S. 934 (1972), which involved a newspaper

advertisement for a furnished apartment in what was denominated as a "white home," point out both the similarity and difference between the *Bigelow* case and the present case, and yet the consistency in the philosophies behind them. In *Bigelow*, there was no paramount public interest to justify the intrusion on First Amendment rights, yet, as made clear in that decision, this compelling public interest may support a regulation when that interest is concerned with maintaining equal racial and ethnic opportunity. Similarly, Willingboro's regulation was precisely aimed at eliminating the threat to maintaining that equal racial and ethnic opportunity in housing, once achieved. Yet, unlike *Bigelow*, the activity regulated referred to panic selling which is unlawful under 42 U.S.C. §3604(e), while abortions were legal in New York State. Essentially, then, the present case and *Bigelow* both espouse a similar philosophy—permitting an interference with First Amendment rights only in the face of a strong public interest, such as the maintenance of equal racial and ethnic opportunity. The decisions, are in reality, harmonious.

Petitioners argue that Willingboro is attempting to "freeze in" an existing racial balance. Without referring to the philosophical merits of affirmative action in such a situation, (see *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1133 (2 Cir. 1973)), the obvious response is that this argument is without factual basis. Willingboro adopted the ordinance so that its residents would not be inclined to sell their homes and move out of fear; it does not prohibit anyone who is financially qualified from purchasing a home anywhere in the Township; it does not restrict or inhibit any resident from selling a home and moving elsewhere. Rather, it only seeks to arrest the fear psychology as an impelling reason to sell and replace that with

an unfettered free choice. There is absolutely no direct correlation (either proven or reasonably conjectured) between the maintenance of a racial and ethnic balance and the ordinance intent. The ordinance affects all equally. Beside, it should not be assumed that a municipality which has consistently acted to encourage equal opportunity in housing now changes its position "in mid-stream."

Thus, there is no conflict with any decision of this Court. Indeed, the philosophy behind this decision is consistent with that espoused in *Barrick Realty, Inc. v. City of Gary, Indiana*, 491 F.2d 161 (7 Cir. 1974), which upheld a similar ordinance aimed at panic selling in an attempt to halt resegregation. In truth, any other result reached below would have been inconsistent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MYRON H. GOTTLIEB,
KESSLER, TUTEK AND GOTTLIEB
Counsel for Respondents

Supreme Court, U. S.
FILED
DEC 20 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-357.

LINMARK ASSOCIATES, INC. and WILLIAM MELLMAN,
Petitioners,

v.

THE TOWNSHIP OF WILLINGBORO and GERALD DALY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE PETITIONERS.

JOHN P. HAUCH, JR.,
ARCHER, GREINER & READ,
A Professional Corporation,
One Centennial Square,
East Euclid Avenue,
Haddonfield, New Jersey. 08033
Counsel for Petitioners.

THOMAS L. EARP,
On the Brief.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. The Willingboro Ordinance Banning "For Sale" Signs Violates Petitioners' Right of Free Speech Under the First and Fourteenth Amendments	12
A. Commercial Advertising Is Protected by the First and Fourteenth Amendments	12
B. A Ban on Advertising Cannot Be Justified if the Goal Sought to Be Accomplished Depends Upon Public Ignorance	14
C. The Justification Offered by the Township Does Not Warrant the Invasion of Free Speech Occasioned by the "For Sale" Sign Ban	17
1. The Township Has Not Demonstrated That an "Evil" Exists	19
2. The "For Sale" Sign Ban Has Not Been Demonstrated to Be Necessary to Avoid "Fear Psychology" and Irrational Reaction	22
3. There Has Been No Demonstration That the "For Sale" Sign Ban Will Prevent "Fear Psychology" and Irrational Reaction	24
4. The Decision in Nebraska Press Association v. Stuart Supports Reaching the Same Result Here	24

INDEX (Continued).

	Page
D. The Sign Ban Cannot Be Justified as a Mere Restriction Upon the Time, Place, or Manner of Communication	26
E. The "For Sale" Sign Ban Cannot Be Justified as a Mere Incidental Restriction of Free Speech	29
II. The Ordinance Banning "For Sale" Signs Violates the Fourteenth Amendment's Equal Protection Clause	33
CONCLUSION	37

CITATIONS.

Cases:	Page
Bigelow v. Virginia, 421 U. S. 809 (1975)	14, 19
Buckley v. Valeo, 424 U. S. 1 (1976)	26, 30
Cohen v. California, 403 U. S. 15 (1971)	19, 31
Cox v. Louisiana, 379 U. S. 536 (1965)	29
Cox Broadcasting Corporation v. Cohn, 420 U. S. 469 (1975)	28
Dennis v. United States, 183 F. 2d 201 (2d Cir. 1950) aff'd, 341 U. S. 494 (1951)	18
Elrod v. Burns, – U. S. –, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976)	18, 30
Erznoznik v. City of Jacksonville, 422 U. S. 205 (1975)	22
Gilmore v. City of Montgomery, 417 U. S. 556 (1974)	35
Gomillian v. Lightfoot, 364 U. S. 339 (1960)	35
Grayned v. City of Rockford, 408 U. S. 104 (1972)	28, 29
Griffin v. County School Board of Prince Edward County, 377 U. S. 218 (1964)	35
Kovacs v. Cooper, 336 U. S. 77 (1949)	29
Levitt and Sons, Inc. v. Division Against Discrimination in State Department of Education, 31 N. J. 514, 154 A. 2d 177, appeal dismissed, 363 U. S. 418 (1960)	4
Malloy v. Hogan, 378 U. S. 1 (1964)	12
Near v. Minnesota, 283 U. S. 697 (1931)	17, 18
Nebraska Press Association v. Stuart, – U. S. – , 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976)	18, 24, 26
Pell v. Procunier, 417 U. S. 817 (1974)	29
Pittsburgh Press Company v. Human Relations Commission, 413 U. S. 376 (1973)	18, 19
Reitman v. Mulkey, 387 U. S. 369 (1967)	35
Thornhill v. Alabama, 310 U. S. 88 (1940)	12
Tinker v. Des Moines Independent Community School District, 393 U. S. 503 (1969)	22
United States v. O'Brien, 391 U. S. 367 (1968)	29, 30
Valentine v. Chrestensen, 316 U. S. 52 (1942)	12

CITATIONS (Continued).

Cases (Continued): Page

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., – U. S. –, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976) 12, 13, 16, 23, 26, 30
Young v. American Mini Theatres, Inc., – U. S. –, 49 L. Ed. 2d 310, 96 S. Ct. – (1976) 19, 29, 31, 32

Constitution and Ordinances:

Amendment I 2, 9, 12, 21, 24
Amendment XIV, Section 1 .....2, 9, 11, 12, 21, 33
Revised General Ordinances of the Township of Willingboro, New Jersey, Chapter XVII:
Section 17-2 ..... 2, 3
Section 17-6.5 ..... 3, 4
Ordinance No. 5-1974 4

Statutes:

Federal Election Campaign Act of 1971, Amended 1974 30
28 U. S. C. § 1254(1) 1
28 U. S. C. § 2101(c) 1

Miscellaneous:

Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1497 (1975) 30
The Supreme Court, 1975 Term, 90 Harv. L. Rev. 1 (1976) ..13, 19

IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1976

—

No. 76-357

—

LINMARK ASSOCIATES, INC. AND WILLIAM MELLMAN,

Petitioners,

v.

THE TOWNSHIP OF WILLINGBORO AND GERALD DALY,

Respondents.

—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—

BRIEF FOR THE PETITIONERS.

—

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 535 F. 2d 786. The opinion of the District Court is unreported and is Appendix B to the Petition for Certiorari.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 28, 1976. A timely petition for rehearing was denied by that court on June 11, 1976. A Petition for Writ of Certiorari was filed on September 8, 1976, less than ninety days after rehearing was denied by the Court of Appeals. *See* 28 U. S. C. § 2101(c). This Court granted the Petition for Writ of Certiorari on November 8, 1976.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED.

Constitution of the United States, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

Constitution of the United States, Amendment XIV, § 1:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised General Ordinances of the Township of Willingboro, New Jersey, Chapter XVII, § 17-2:

> ". . . it shall be unlawful to erect or maintain any sign at any place within the said Township of Willingboro when the same does not comply with the provisions of this chapter."

Prior to its repeal on March 18, 1974, Section 17-6.5 of the Ordinances allowed, subject to certain conditions, the use of signs relating to the "lease, rental, or sale" of residential premises. On March 18, 1974, Section 17-6.5 was repealed by Ordinance No. 5-1974, thus making it unlawful to use such signs.

The full text of Chapter XVII, Revised General Ordinances, is set forth in the Appendix (A 10-22).

QUESTION PRESENTED.

Does a municipal ordinance which bans the use of "For Sale" signs on residential premises deny prospective sellers and buyers the freedom of speech, equal protection of the laws, and due process guaranteed by the First and Fourteenth Amendments?

STATEMENT OF THE CASE.

A. The Willingboro Sign Ordinance.

In Chapter XVII of its Revised General Ordinances, the Township of Willingboro, New Jersey, has adopted a comprehensive regulatory scheme governing the erection and maintenance of signs. Section 17-2 of the Revised General Ordinances provides:

> Signs may be erected and maintained in the Township of Willingboro only when the same comply with the provisions of this chapter, and it shall be unlawful to erect or maintain any sign at any place within the said Township of Willingboro when the same does not comply with the provisions of this chapter (A 11).

Thus the Revised General Ordinances prohibit the use of any sign which is not specifically allowed by the Ordinances.

Prior to March 18, 1974, the Ordinances contained Section 17-6.5, which allowed the use of:

> 17-6.5 *Rental Signs.* Signs pertaining to the lease, rental or sale of the premises on which they appear, subject to the following conditions:
>
> a. The size of the signs shall not exceed eight square feet in area.
>
> b. The sign shall be located upon the premises to which it pertains and shall not project beyond the property line of such premises.
>
> c. Such signs shall be removed within five days after the execution of any lease, rental agreement or agreement of sale for the premises in question by the occupant of the premises and/or the owner of the sign.

d. Not more than two such signs are to be placed upon any property. (A 14-15).

On March 18, 1974, the Township Counsel adopted Ordinance No. 5-1974, which repealed Section 17-6.5 of the Revised General Ordinances (A 23). As the result of such repeal, signs relating to the lease, rental or sale of homes in Willingboro were banned from that community (Complaint para. 9 at A 3 and Answer para. 3 at A 6).

B. This Action.

On July 24, 1974, plaintiffs filed their complaint demanding that Ordinance No. 5-1974 be declared unconstitutional and that its enforcement be enjoined (A 5). After a trial, the District Court held the ordinance unconstitutional. On appeal, the Court of Appeals for the Third Circuit, by a 2-1 decision, upheld the ordinance.

C. The Evidence.

The Township of Willingboro is located in Burlington County, New Jersey. Development of the Township began in the late 1950's when Levitt and Sons, Inc., began building moderately-priced homes for middle-income families. Early during the development, the Levitt organization refused to sell homes to non-white persons. In 1960 that practice was enjoined by the New Jersey Supreme Court. *Levitt and Sons, Inc. v. Division Against Discrimination in State Department of Education,* 31 N. J. 514, 154 A. 2d 177, *appeal dismissed,* 363 U. S. 418 (1960).

The non-white population of Willingboro increased from less than 1% in 1960 to 11.7% in 1970 and to 18.2% in 1973 (U. S. C. A. Joint Appendix 128a). The population of Willingboro had historically been transient because of the proximity of military installations and the nature of

employment in the area. Because of these factors, there arose within the community a concern that the community was unstable and that a large influx of non-white homeowners was undesirable. This concern was perhaps stated most articulately by Township Council member and former Mayor William J. Kearns, Jr., who testified on direct examination:

> . . . [P]eople in the community were expressing a desire to sell their homes and move to other areas of Burlington County because what they sensed was a lack of stability or a large turnover in the community, and that this large turnover was resulting in a substantial influx of minority groups into the community beyond what could be sustained without the community itself turning into a ghetto within the county.
>
> . . . .
>
> I don't think anyone was concerned with people of minority groups moving into the community or reaching a 20 percent, or even somewhere in the range of 20 to 25 percent minority grouping. They felt this was properly a generally average throughout the Delaware Valley area.
>
> But they did feel that if we had a situation where white home owners in the community were moving, not because they were transferred or not to move to a larger home or a smaller home, for other economic reasons, but were moving because what they sensed was the reaction of the community, but that we would wind up with Willingboro hitting beyond the point of minority group population that would turn it into an isolated pocket of minority groups in Burlington County. It would no longer reflect an integrated community, but would become a ghetto. [U. S. C. A. Joint Appendix at 179a-182a].

From other witnesses for the Township came the following testimony: After the ban on signs, one realtor was "still representing a straight about 80/20 minority to white seller buyer, both sides just maintaining a perfect balance and we're actually very happy." (U. S. C. A. Jt. App. 160a). That realtor did not consider that "we've had a panic in Willingboro." (U. S. C. A. Jt. App. 163a). He was familiar with a town that prohibited signs and acknowledged that it had "not one" black family (U. S. C. A. Jt. App. 165a). He believed that the 80/20 ratio represented "stability" in the community (U. S. C. A. Jt. App. 170a). Willingboro has experienced no "mass movement of whites out of town replaced by blacks." (U. S. C. A. Jt. App. 171a). The former mayor, who was a council member, did not indicate any "excess of turnover of property in any way whatsoever." (U. S. C. A. Jt. App. 198a). "The number of turnovers was not out of line with national averages. . . ." (U. S. C. A. Jt. App. 201a). A council member testified, with regard to the sign ban, that "the primary reason was stability." (U. S. C. A. Jt. App. 210a). He admitted, however, that there was no "unstable position." (U. S. C. A. Jt. App. 213a). The prices of homes range from "the low middle twenties" to the "low fifties." (U. S. C. A. Jt. App. 215a). There was no racial crisis at the time the ordinance was considered (U. S. C. A. Jt. App. 237a).

D. The Trial Court's Findings of Fact.

In holding that the ordinance was unconstitutional, the District Court found:

> [I]t appears that the true thrust of these sign ordinances is to promote a racial balance or more properly, a racial imbalance in order to perpetuate existing racial lines.
>
> There can be no doubt that this is precisely the result desired by the Willingboro Town Council in adopting this ordinance. However, the key distinction between Willingboro and Gary, Indiana is that in Gary the stimulus and response were easily observable. As "For Sale" signs appeared, whites disappeared from the city *en masse*. Yet in Willingboro, there exists no evidence of similar patterns. Rather, there is merely an indication that its residents are concerned that there may be a large influx of minority groups moving into the town with the resultant effect being a reduction in property values. . . .
>
> • • •
>
> "In light of testimony . . . that approximately thirty percent of inquiries . . . are a result of 'For Sale' signs being posted on residences, it is apparent that the ordinance brings about a serious denial of a property owner's right to freely and reasonably express to others the desire to sell in violation of the First Amendment."

The District Court found further that a prospective buyer has only a limited "option" in choosing a home from those shown to him by a realtor and "[t]his fact along with the purported purpose of the ordinance—'stabilization of neighborhoods'—may have the ultimate effect of freezing

in past discrimination, denying blacks a fair opportunity to find suitable housing."

The District Court also found "abundant evidence of potential interference with the right to travel," and that a potential buyer must seek out a realtor "no longer being able to merely assess a particular residential area in a community to ascertain for himself the homes which are available."

E. The Decision of the Court of Appeals.

The Court of Appeals for the Third Circuit reversed the decision of the District Court. Circuit Judge Gibbons filed an opinion dissenting from the reversal.

SUMMARY OF ARGUMENT.

The ordinance in question prevents each homeowner in Willingboro from communicating by a sign on his premises the fact that his home is for sale. It likewise prevents the public from receiving such information from "For Sale" signs. As communication protected by the First and Fourteenth Amendments, the message of a "For Sale" sign cannot be banned merely to avoid an assumed irrational reaction on the part of homeowners. Furthermore, the means adopted by the Township to effect its purpose violates the Equal Protection Clause of the Fourteenth Amendment since the purpose and effect of the ordinance is to "stabilize" the Township's racial balance which, stated otherwise, means the exclusion of racial minorities from the Township.

I.

Commercial advertising, including the use of "For Sale" signs, is protected communication under the First Amendment. Open channels of communication regarding lawful commercial activities are essential under the American free enterprise system. The purpose of the Willingboro sign ban is to prevent "fear psychology" which "might result in Willingboro metamorphosing from an integrated community to a ghetto." To prevent "fear psychology" the Township has sought to suppress public knowledge that homes are for sale. The goal of the sign ban thus depends upon public ignorance and hence the ban is unlawful.

II.

The Township's ban on "For Sale" signs is "presumptively unconstitutional." The Township has not sustained

its burden to show the existence of an interest sufficiently vital to justify its ban on this form of communication. Justification is not sought on the grounds of aesthetics or to prevent false, deceptive, or illegal advertising or activities. Property values have not declined. The turnover of homes in Willingboro has not been out of line with national averages. The Township's proffered justification—to prevent a change in the racial balance of the Township—is too amorphous an apprehension to warrant restrictions upon free speech. The Township's homeowners should be permitted to know the truth, and it cannot be presumed that they are incapable of rational responses if all relevant information is known to them. Furthermore, avoidance of the Township's perceived problem will not be realized by prohibiting "For Sale" signs, since residents have ample alternative means to learn that other residents intend to move away from the Township.

III.

The Township's ban on "For Sale" signs is directed solely against the message conveyed by such signs. There are no alternatives to "For Sale" signs which are likely to accomplish as fair and honest a representation of the property being offered for sale. "For Sale" signs do not require the obtaining and reading of newspaper advertisements, which may not always be objective. They do not require dealing with third parties who may have an interest in selling homes. No off-premises advertising can convey as effectively as a "For Sale" sign the relationship between a particular home and the area in which it is located. The sign ban cannot be justified as a mere incidental restriction on free speech since the Township's action was directed expressly toward preventing communication.

IV.

The District Court, amply supported by the record, found:

> [I]t appears that the true thrust of these sign ordinances is to promote a racial balance or more properly, a racial imbalance in order to perpetuate existing racial lines.
>
> There can be no doubt that this is precisely the result desired by the Willingboro Town Council in adopting this ordinance. . . . [Petition for Certiorari, App. B at 4].

An ordinance having such a purpose violates the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT.

I. The Willingboro Ordinance Banning "For Sale" Signs Violates Petitioners' Right of Free Speech Under the First and Fourteenth Amendments.

A. Commercial Advertising Is Protected by the First and Fourteenth Amendments.[1]

This Court's decision and opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, – U. S. – , 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976), laid to rest the notion that protection under the First Amendment does not extend to "purely commercial advertising." *Cf. Valentine v. Chrestensen,* 316 U. S. 52 (1942). In so holding, this Court noted that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." (– U. S. at – , 48 L. Ed. 2d at 359, 96 S. Ct. at –). That society as a whole has a strong interest in free commercial advertising was also recognized:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. [– U. S. at –, 48 L. Ed. 2d at 360, 96 S. Ct. at –].

1. The Fourteenth Amendment's Due Process Clause forbids state action which would offend the First Amendment if taken by the federal Government. *E.g., Thornhill v. Alabama,* 310 U. S. 88, 95 (1940). The same standards apply under both Amendments. *Malloy v. Hogan,* 378 U. S. 1, 10 (1964).

Commentators have noted a further consideration supporting this Court's decision:

> "[C]ommercial speech may be a vehicle for both personal and 'lifestyle' expression, and for persuation, and hence have value analogous to that of literary fiction." *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 1, 145 n. 23 (1976).

The present case supports this Court's decision not to deprive commercial speech of First Amendment protection. A person's choices of where he will live and what kind of home he will inhabit represent intensely personal concerns as well as practical concerns. Persons considering purchasing homes, and homeowners considering whether to remain in their homes, can make their decisions intelligently only if they have access to all relevant information. Advertising regarding the sale of homes plainly provides information which is relevant, if not crucial, to decisions such as these.

Furthermore, a homeowner who wishes to sell his home has an undisputed interest in communicating to the general public the fact that his home is for sale. The very fact that Willingboro has sought to forbid "For Sale" signs, and the reasons proffered by the Township to justify its sign ban, are testimony to the fact that such signs are an effective means of conveying that message.

Even those people who are not active participants in the real estate market have an interest in the information conveyed by "For Sale" signs. This Court noted in the *Virginia State Board of Pharmacy* decision:

> [If the free flow of commercial information] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. [— U. S. at — , 48 L. Ed. 2d at 360].

The use and ownership of real estate within a community are matters of concern to members of that community whether or not each member may be involved actively in the local real estate market. The free flow of information about which properties are for sale in a community may be of great importance in insuring that public decisions with regard to the proper regulation of land use are made intelligently. *See generally Bigelow v. Virginia,* 421 U. S. 809, 821-822 (1975).

Petitioners take it to be established, therefore, that commercial advertising—including the use of "For Sale" signs—is entitled to protection under the First Amendment. For reasons expressed hereinafter, the "For Sale" sign ban adopted by Willingboro is an impermissible infringement upon protected communication.

B. A Ban on Advertising Cannot Be Justified if the Goal Sought to Be Accomplished Depends Upon Public Ignorance.

The purpose of the Willingboro Township Council in banning "For Sale" signs has been variously described during litigation of this case, but in this Court the Township has sought to justify the ban as an attempt to avoid "fear psychology" which "might result in Willingboro metamorphosing from an integrated community to a ghetto." (Brief in Opposition to Petition for Certiorari, at 8-9). Differently expressed, the Township Council

asserts that if homeowners see numerous "For Sale" signs, they will conclude that numerous homes are for sale and may rush to sell their own homes and affect the racial composition of the Township in ways that the Township considers detrimental.

Implicit within the Township's argument are assumptions that:

1. Seeking to maintain a predominately-white community is a legitimate goal.

2. Homeowners seeing "For Sale" signs will assume (a) that white homeowners are selling their homes and (b) that non-white persons will buy the homes.

3. Such persons will experience a "fear psychology."

4. Such persons will rush to sell their own homes.

5. This "fear psychology" and rush to sell are irrational.

6. Non-white persons will purchase most or many of homes thus offered for sale.

None of these assumptions have been demonstrated to be true. Furthermore, even if the assumptions were true, there is no reason to believe that the ban on "For Sale" signs would prevent the evil sought to be prevented. Even if the assumptions were true and the sign ban might reasonably prevent "fear psychology," however, the "For Sale" sign ban is nevertheless unlawful under the First Amendment because its goal depends upon public ignorance.

The desired effect of the sign ban is to prevent "fear psychology" by limiting public knowledge that homes are

for sale. All of the stated goals of the sign ban depend upon ignorance on the part of the public. A similar proffered justification for a drug-price advertising ban was considered and rejected by the Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra:*

> The challenge now made, however, is based on the First Amendment. This casts the Board's justifications in a different light, for on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information. . . .
>
> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. [Citation omitted]. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have re-enforced our view that it is. We so hold. [— U. S. at —, —, 48 L. Ed. 2d 362, 363].

In this case, as well, the Township argues that its goal is to avoid "irrational reaction" by homeowners (Brief in Opposition to Petition for Certiorari, at 8). That may or may not be true. In the American constitutional system, however, it is not for the government to determine for its citizens whether a conclusion to be drawn from certain facts is correct or not. If the Township Council believes the reaction to be irrational, its sole constitutional remedy is to educate its citizens and convince them that their "fear psychology" is unfounded.

A homeowner commits no wrong by selling his home. If a homeowner dislikes his neighborhood or his neighbors, for reasons bigoted or otherwise, he is free to sell his home and move elsewhere. If the fact that many homes are offered for sale is an indication of neighborhood deterioration, a decision to sell might be rational rather than irrational. The Township's approach to the perceived problem, however, has not been to confront the problem maturely and openly. Rather the Township has sought to hide the problem by seeking to deprive homeowners of knowledge that homes are for sale. Under the authority cited, the sign ban cannot prevail over the First Amendment, since its goals depend upon public ignorance.

C. The Justification Offered by the Township Does Not Warrant the Invasion of Free Speech Occasioned by the "For Sale" Sign Ban.

Petitioners concede that protection of speech under the First Amendment is "not absolutely unlimited." *Near*

v. Minnesota, 283 U. S. 697, 716 (1931). Where communication is sought to be banned by government action, however, this Court has accepted that the government action is "presumptively unconstitutional." *Nebraska Press Association v. Stuart,* – U. S. – , 49 L. Ed. 2d 683, 697, 96 S. Ct. 2791 (1976), *quoting Pittsburgh Press Company v. Human Relations Commission,* 413 U. S. 376, 396 (1973) (Burger, C. J., dissenting). The burden upon the government is a "heavy burden of showing justification for the prior restraint." *Id.*

As expressed by Justice Brennan in his opinion in *Elrod v. Burns,* – U. S. – , – , 49 L. Ed. 2d 547, 559, 96 S. Ct. 2673, 2684 (1976):

> It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. . . . Thus encroachment "cannot be justified by a mere showing of some legitimate governmental interest." *Kusper v. Pontikes,* 414 U. S. 51, 58, 38 L. Ed. 2d 260, 94 S. Ct. 303 (1973). The interest advanced must be paramount, one of vital importance, and the burden is on the Government to show the existence of such an interest.

In the present case, the Township has not met its heavy burden.

Where the government attempts to prevent communication of a certain message, the Court's obligation is to determine whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Dennis v. United States,* 183 F. 2d 201, 212 (2d Cir. 1950), *aff'd,* 341 U. S. 494 (1951) (L. Hand, J.).[2] Here the "For Sale" sign ban fails the test:

2. This is thought to be a conservative test:
Cases like Brandenburg v. Ohio, 395 U. S. 444 (1969), appear implicitly to reject the open-ended, indeterminate Hand approach . . . in favor of a more narrow definition of the types of speech that may be suppressed or punished, and to adopt the clear and present danger test's requirement that freedom of speech can be overridden only where the danger to be averted is imminent and highly probable.
The Supreme Court, 1975 Term, 90 HARV. L. REV. 1, 161 n. 11 (1976). To the extent that any test focuses upon imminency and high probability of the perceived danger, such test favors Petitioners' argument herein.

1. There is no demonstrated "evil."

2. The "For Sale" sign ban is not "necessary."

3. The "For Sale" sign ban will not "avoid the danger."

1. The Township Has Not Demonstrated That an "Evil" Exists.

Before analyzing the Township's attempted justification of its "For Sale" sign ban, it might be appropriate to eliminate expressly the factors which are *not* involved in the case. *See Cohen v. California,* 403 U. S. 15 (1971).

This case does not involve a zoning ordinance sought to be justified on grounds of aesthetics. *Cf. Young v. American Mini Theatres, Inc.,* – U. S. – , – , 49 L. Ed. 2d 310, 327-334, 96 S. Ct. – , – (1976) (Powell, J., concurring). It does not involve false or deceptive advertising or communication which infringes upon the privacy of others.

A "For Sale" sign does not propose or encourage activities which are illegal. Thus a "For Sale" sign is similar to the abortion advertisement at issue in *Bigelow v. Virginia,* 421 U. S. 809 (1975), and is distinguishable from the sex-designated help-wanted advertisements considered in *Pittsburgh Press Company v. Human Relations Commission,* 413 U. S. 376 (1973).

Moreover, this case does not involve any actual evidence of panic sales or declines in property values. The District Court found:

> Yet in Willingboro, there exists no evidence of similar patterns ["whites disappear[ing] from the city *en masse*"]. Rather, there is merely an indication that its residents are concerned that there may be a large influx of minority groups moving into the town with the resultant effect being a reduction in property values. [Petition for Certiorari, App. B at 4].[3]

As articulated in its brief opposing certiorari, the Township's attempted justification for its "For Sale" sign ban is the following:

> Although Willingboro was and had been fully integrated, Township Council concluded that the fear psychology might result in Willingboro metamorphosing from an integrated community to a ghetto. [Brief in Opposition to Petition for Certiorari, at 8].

Thus the ultimate "evil" feared by the Township Council was that the Township might lose its predominately-white racial composition—that there might be an increase in the non-white percentage of the Township's population. A secondary "evil" was "fear psychology." Neither consideration represents a legitimate "evil" of sufficient gravity to allow suppression of free communication.

Petitioners are aware of no authority recognizing as legitimate a municipality's efforts to exclude or to limit the

3. No reduction in property values was shown. To the contrary, at trial a member of the Willingboro Township Council testified: "Right now, and over the last few years, we have experienced an increase in property values." (Petition for Certiorari, App. A at 41). A councilman also testified: "The number of turnovers was not out of line with national averages . . ." (U. S. C. A. Jt. App. 201a).

influx of non-white racial groups. Indeed, as Petitioners argue hereinafter in Part II of this Argument, any effort to exclude non-white residents or to adopt a quota for non-white residents would violate the Fourteenth Amendment's guarantee of Equal protection. Petitioners take it to be beyond dispute that a municipality may not justify a restraint on activity protected by the First Amendment by asserting a purpose which would violate the Fourteenth Amendment.

Furthermore, the Township has not demonstrated that "For Sale" signs cause the secondary "evil"—the alleged "fear psychology." The "fear psychology," it is alleged, arises when homeowners obtain knowledge that other homeowners are selling their homes. Yet such knowledge might be obtained in many ways—through "For Sale" signs; by word-of-mouth; through newspaper advertisements; through other advertising media. Homeowners surely will see moving vans and other evidence that townspeople are moving from their homes. A concerned homeowner certainly will be aware of new neighbors as they come and go in their daily activities.

Petitioners concede that "For Sale" signs are an effective way to communicate the fact that homes are for sale. Yet if citizens of Willingboro have been brought to such an emotional state that they would be expected to react irrationally to knowledge that others' homes are for sale, it would be expected that they would be actively seeking out information regarding the housing market. They would be talking to neighbors, reading newspaper advertising, and calling on real estate brokers. They would be sensitive to moving vans and to new faces among their neighbors. The Township has shown no rational basis for concluding that "For Sale" signs are the cause of "fear psychology."

When a Township seeks to justify a restraint upon free speech by citing an "evil" which it seeks to avoid, the Township ought to expect that its alleged "evil" will be considered closely, perhaps skeptically, from all vantage points. In *Erznoznik v. City of Jacksonville*, 422 U. S. 205 (1975), this Court considered an ordinance banning the showing of motion pictures containing nudity where such motion pictures would be visible from public places. Various argument were put forth to justify the ordinance: that it protected the privacy of unwilling viewers, that it protected children, that it aided regulation of traffic. Each of the arguments, upon analysis, was lacking in substance: The unwilling viewer could simply avert his eyes; the ordinance was overbroad if meant to protect children; it was underinclusive if meant to regulate traffic. Here, as well, the proffered justification cannot survive analysis. The perceived evil rises no further than did the "undifferentiated fear or apprehension" determined to be insufficient to warrant a restriction upon free speech in *Tinker v. Des Moines Independent Community School District*, 393 U. S. 503, 508 (1969).

Upon analysis, the "evil" cited in this case is no evil at all. The justification proffered by the Township cannot be accepted.

2. The "For Sale" Sign Ban Has Not Been Demonstrated to Be Necessary to Avoid "Fear Psychology" and Irrational Reaction.

"Fear psychology" is contended by the Township to be "an irrational reaction." (Brief in Opposition to Petition for Certiorari, at 8). For the Township to contend otherwise would doom its argument, since it could hardly justify an attempt to prevent its citizens from learning the truth if its only concern was that they would react rationally upon learning the truth.

"Irrational reaction," in the Township's argument, seems to be a homeowner's desire to sell his home and move away from his neighborhood. If avoidance of that "evil" is the Township's goal, the Township has failed to demonstrate that infringement upon free speech rights is necessary to avoid the "evil."

This point was considered in the Court's opinion in *Virginia State Board of Pharmacy, supra.* There, as here, an infringement upon free speech rights was sought to be justified by a contention that citizens would be best served "if they are not permitted to know" the truth. This Court there pointed out:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. [– U. S. at – , 48 L. Ed. at 363].

Thus under the constitutional system existing in the United States, communication and education are always an alternative remedy for irrational behavior. When a choice must be made between censorship and education as a remedy for irrational reaction, the Constitution dictates that education be the alternative remedy adopted.

Unless the Township is prepared to contend that its citizens are incapable of rational responses, a contention which the record will not support, the Township cannot contend that there exists no alternative to the "For Sale" sign ban. Since an alternative exists, it cannot be said that the sign ban is necessary to avoid any perceived "evil."

3. There Has Been No Demonstration That the "For Sale" Sign Ban Will Prevent "Fear Psychology" and Irrational Reaction.

In assessing whether governmental action infringing upon free speech is lawful notwithstanding the First Amendment, the Court must consider whether the action is likely to avoid the perceived "evil." *Nebraska Press Association v. Stuart, supra.* Where the government cannot demonstrate that its action will be effective, its action must be held unlawful even if the "evil" is real and alternative remedies do not exist.

Here there has been no demonstration that "fear psychology" will be avoided by banning "For Sale" signs. As discussed above, homeowners obtain information regarding the state of the housing market from many sources—word-of-mouth, formal advertising, and simply watching the events that occur around them. If homeowners are so prone to panic that "For Sale" signs might cause "fear psychology," it would be expected that they would be sensitive to other indications—both formal and informal—that homes are for sale. If, therefore, "fear psychology" is a real possibility, banning "For Sale" signs would be unlikely to prevent the "evil."

When significant First Amendment rights are to be suppressed, the government should be prepared to demonstrate that its proposed action will actually achieve some significant goal. Here no such demonstration has been made.

4. The Decision in *Nebraska Press Association v. Stuart* Supports Reaching the Same Result Here.

In *Nebraska Press Association v. Stuart*, — U. S. — , 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976), the Court considered the lawfulness of a court's pretrial order restraining publication of certain facts concerning a homicide. Without dissent, the Court held the order to be unlawful.

The Chief Justice, writing for the Court, recognized that the lower court had "acted responsibly, out of a legitimate concern, in an effort to protect the defendant's right to a fair trial." (— U. S. at — , 49 L. Ed. 2d at 695, 96 S. Ct. at —). Nevertheless the lower court order was held unlawful as violative of the First and Fourteenth Amendments, since:

> [O]n the record now before us it is not clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court. We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require. [— U. S. at — , 49 L. Ed. 2d at 703, 96 S. Ct. at —].

The same considerations exist here. Even if the Township acted legitimately in attempting to avoid "fear psychology" and stabilize its racial composition:

> 1. The record will not support a finding that continued use of "For Sale" signs would have led to "fear psychology" and panic selling by white homeowners.

2. The record will not support a finding that alternatives to an absolute ban on "For Sale" signs would not have alleviated the problems.

3. It cannot be concluded that the ban on "For Sale" signs would serve its intended purpose.

The considerations regarded as significant in the *Nebraska Press Association* opinion weigh in the same direction here. That decision is firm authority for the same result here.

D. The Sign Ban Cannot Be Justified as a Mere Restriction Upon the Time, Place, or Manner of Communication.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* this Court noted as a caveat to its decision:

> We have often approved restrictions of that kind ["time, place, and manner" restrictions] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. [– U. S. at –, 48 L. Ed. 2d at 363-364, 96 S. Ct. at –].

As expressed in *Buckley v. Valeo,* 424 U. S. 1, 12 (1976):

> The government may adopt reasonable time, place, and manner regulations, which do not discriminate between speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication.

The "For Sale" sign ban at issue herein cannot be justified under any such theory.

First, the sign ban cannot be justified without reference to the content of the sign. The Township's proffered justification for the sign ban focuses upon the message itself rather than upon the sign, and the Township's purpose will be realized only if the message is suppressed.

Second, the "For Sale" sign ban serves no legitimate governmental interest. To keep the public in ignorance, as shown above, is not a legitimate governmental interest even if the government fears that the public may react irrationally to the facts sought to be kept hidden. Nor is the maintenance of a predominately-white racial balance a legitimate governmental purpose.

Third, the sign ban does not leave open ample alternative channels of communication. The Township's purpose, in fact, will be realized only if free communication is significantly curtailed. Petitioner Mellman testified at trial that thirty percent of his inquiries were the result of sign placement. The District Court found that without the use of "For Sale" signs "one who wishes to purchase a home in Willingboro has no way of learning what is available." (Petition for Certiorari, App. B at 5). Moreover, there are numerous citizens of Willingboro who may not be in the market to purchase homes but who nevertheless are vitally interested in the market for homes. These persons may have no ready means to learn of market conditions except through their awareness of "For Sale" signs.

In this regard, the unique effectiveness of on-premises "For Sale" signs should be considered. When a "For Sale" sign is used to sell residential premises, the sign, the home, and the grounds convey the "message" as completely and honestly as any advertising is likely to accomplish. The on-premises sign enables the prospective purchaser to see the home together with its neighborhood, the nearby schools and shopping centers, and all other

aspects of the immediate surroundings. No newspaper advertisement can be as effective or as candid.

Furthermore, residential "For Sale" signs are relatively inexpensive and can be erected without difficulty at any time. Newspaper advertising involves time and expense. Brokerage listings involve a contract.

"For Sale" signs are useful, too, in informing members of the general public who might not be actively involved in the real estate market. All passers-by may view a "For Sale" sign, whereas few citizens not considering buying or selling homes would be expected to pore through newspaper advertisements or consult real estate brokers. This Court recognized in *Cox Broadcasting Corporation v. Cohn*, 420 U. S. 469, 491 (1975), that in our society "each individual has but limited time and resources with which to observe at first hand the operation of his government . . . ." The same is true of other concerns as well. Forbidding "For Sale" signs would force the individual citizen to spend an inordinate quantity of time and resources to gain the same information.

For many reasons, then, "For Sale" signs are uniquely effective in conveying the message they contain.

As expressed in *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972), in discussing regulation of speech as to time, manner, and place:

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. [Footnote omitted].

Here there is no contention that placement of a simple "For Sale" sign on residential premises is incompatible

with the normal use of the residential premises and neighborhood. The complete ban on "For Sale" signs cannot be considered a proper "time, manner, or place" regulation. In no way are "For Sale" signs analogous to the "loud and raucous" sound trucks considered in *Kovacs v. Cooper*, 336 U. S. 77 (1949); the "noise or diversion" interfering with school activities considered in *Grayned v. City of Rockford, supra;* the "street meeting in the middle of Times Square at the rush hour" mentioned hypothetically in *Cox v. Louisiana*, 379 U. S. 536, 554 (1965); or the face-to-face interviews between newsmen and prison inmates considered in *Pell v. Procunier*, 417 U. S. 817 (1974).

E. The "For Sale" Sign Ban Cannot Be Justified as a Mere Incidental Restriction of Free Speech.

Where governmental action is not directed at preventing communication and has only incidental or minimal impact upon free speech, the action will be upheld

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U. S. 367, 377 (1968); *Young v. American Mini Theatres, Inc.*, — U. S. —, 49 L. Ed. 2d 310, 331 (1976) (Powell, J., dissenting).

In this case, it cannot be said that the Township's purpose is within its constitutional power. Fostering a predominately-white racial composition is not a constitutional governmental goal. Nor is it constitutional to

seek goals in ways which depend upon public ignorance. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra.*

Banning "For Sale" signs, as is argued more fully above, is not calculated to further the alleged governmental interest. "For Sale" signs have not been demonstrated to cause "fear psychology" nor will their prohibition prevent "fear psychology," since citizens have other means of learning the truth and will be expected to do so if, indeed, they are prone to "fear psychology."

It cannot be said that the Township's "interest is unrelated to the suppression of free expression," as the *O'Brien* test demands. This case is analogous to that presented in *Buckley v. Valeo,* 424 U. S. 1 (1976), where the Court considered provisions of the Federal Election Campaign Act of 1971, as amended in 1974. There, as here, the governmental purpose involved "suppressing communication" and was based upon a perception that the communication was "itself thought to be harmful." *Id.,* 424 U. S. at –, 46 L. Ed. 2d at 686, 687, *quoting United States v. O'Brien, supra,* 391 U. S. at 382. This case is likewise analogous to *Elrod v. Burns,* – U. S. –, 49 L. Ed. 2d 547 (1976), where, for the same reasons, the court refused to apply the *O'Brien* test to a patronage hiring system (– U. S. at – n.17, 49 L. Ed. 2d at 560 n.17).

This portion of the *O'Brien* test was illustrated in Ely, *Flag Desecration: A Case Study in the Roles of Categorization And Balancing In First Amendment Analysis,* 88 HARV. L. REV. 1482, 1497 (1975), as follows:

> If, for example, the state asserts an interest in discouraging riots, the Court will ask why that interest is implicated in the case at bar. If the answer is (as in such cases it will likely have to be) that the danger was created by what the defendant was saying, the state's interest is not unrelated to the suppression of free expression within the meaning of *O'Brien's* criterion [2].

Plainly the present case falls within the Ely example of where the *O'Brien* test is inapplicable. *See also Cohen v. California,* 403 U. S. 15 (1971).

Nor can it be said that the restriction is no greater than the minimum amount essential to accomplish the goal of eliminating "fear psychology." As shown above, education exists as an alternative remedy to combat irrational reaction.

The Township's case is not aided by the decision in *Young v. American Mini Theatres, Inc.,* – U. S. –, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976). In that case a divided majority of the Court upheld a zoning ordinance designed to prevent concentration of "adult" threaters and certain other establishments. The members of the Court constituting the majority noted the following facts in support of their decision:

> 1. The ordinance did not limit the number of adult theaters which might operate within the municipality. (– U. S. at –, 49 L. Ed. 2d at 321, 96 S. Ct. at – (Opinion of the Court)).
>
> 2. The availability of adult films was essentially unrestrained by the ordinance. (– U. S. at –, 49 L. Ed. 2d at 321, 330, 96 S. Ct. at –, – (Opinion of the Court and Concurring Opinion of Justice Powell)).
>
> 3. The regulation was "unaffected by whatever social, political, or philosophical message the film may be intended to communicate." (– U. S. at –, 49 L. Ed. 2d at 326, 96 S. Ct. at – (Opinion of Justice Stevens for four members of the Court)).

4. The affected communication was not one "in which the content or effectiveness of the message depend[ed] in some measure upon where or how it was conveyed." (— U. S. at n.2, 49 L. Ed. 2d at 331 n.2, 96 S. Ct. at — n.2 (Concurring Opinion of Justice Powell)).

5. The "governmental interest prompting the inclusion in the ordinance was wholly unrelated to any suppression of free expression." (— U. S. at —, 49 L. Ed. 2d at 332, 96 S. Ct. at — (Concurring Opinion of Justice Powell)).

None of these factors exist here. This ordinance not only limits the number, but absolutely forbids the use of "For Sale" signs within Willingboro. The record demonstrates that a homeowner's ability to publicize his wish to sell his home, as well as the availability of information regarding the housing market, are severely diminished by the ordinance. The record likewise demonstrates that the expressed purpose in adopting the ordinance was to suppress the communication of a certain "message"—that homes are for sale. The record demonstrates, and the ordinance in fact assumes, that the effectiveness of that "message" will be diminished if "For Sale" signs cannot be used to communicate it. The governmental interest in enacting the sign ban was not unrelated to suppression of free expression but in fact depended upon its suppression.

Moreover, the disposition of this case would not be governed by the holding in *Young* even if this Court should adopt the holding which would have been reached by four members of the Court in that case—that "a line may be drawn on the basis of content without violating the Government's paramount obligation of neutrality in its regulation of protected communication." (— U. S. at —, 49 L.

Ed. 2d at 326, 96 S. Ct. at —). This case does not involve incitement to crime or violence, or fighting words, or information concerning national security, or false or deceptive statements, or profanity, or obscenity, or any form of erotic materials. This case involves the communication, and the attempted censorship, of a pure message which is neither unlawful, deceptive, nor offensive: the fact that a home is being offered for sale. The ordinance has no impact other than on free communication, and all of its goals depend upon suppression of communication. The *Young* result is no authority for upholding the ordinance in question here.

II. The Ordinance Banning "For Sale" Signs Violates the Fourteenth Amendment's Equal Protection Clause.

The District Court found:

> [I]t appears that the true thrust of these sign ordinances is to promote a racial balance or more properly, a racial imbalance in order to perpetuate existing racial lines.
>
> There can be no doubt that this is precisely the result desired by the Willingboro Town Council in adopting this ordinance. . . . [Petition for Certiorari, App. B at 4].

In this Court the Township acknowledges that its ultimate goal in adopting the "For Sale" sign ban was to prevent the Township from "metamorphosing from an integrated community to a ghetto." (Brief in Opposition to Petition for Certiorari, at 9).

The District Court found further:

> Even more important is the concomitant result: one who wishes to purchase a home in Willingboro has no way of learning what is available. He only

has the "option" of choosing a home from those which he is shown by a realtor, thereby necessitating the use of a real estate brokerage firm. Further, the broker or salesman may be very selective in choosing which home he wishes to show a potential buyer. This fact along with the purported "purpose of the ordinance—'stabilization of neighborhoods'—may have the ultimate effect of freezing in past discrimination, denying blacks a fair opportunity to find suitable housing." *DeKalb Real Estate Board* [*v. Chairman and Board of Commissioners of Roads and Revenue for DeKalb County,* 378 F. Supp. 748 (N. D. Ga. 1973)].

Thus, this circumstance leads to the natural conclusion that in its application the Willingboro ordinance results in an infringement upon the fundamental right to travel [citation omitted], a right which may not be abridged absent a compelling State interest. [Petition for Certiorari, App. B at 5].

Dissenting in the Court of Appeals, Circuit Judge Gibbons expanded upon this point:

> The intended purpose of the ordinance is to discriminate against racial minorities by "stabilizing" the non-white population of Willingboro at not more than 20 percent. This is not affirmative action to overcome the effects of past discrimination, but is invidious discrimination of the most pernicious sort, against a discrete and insular minority seeking fulfillment of the American Dream of owning a home in the suburbs. [Petition for Certiorari, App. A at 46-47].

Thus the motive of the Township in adopting the ordinance was to prevent a significant increase in the non-white percentage of the Township's population. The

effect of the ordinance was to interfere significantly with prospective purchasers' access to homes actually available for sale. Under prior decisions of the Court, the ordinance's discriminatory purpose and effect violated the Fourteenth Amendment's equal protection clause. *E.g., Gilmore v. City of Montgomery,* 417 U. S. 556 (1974); *Reitman v. Mulkey,* 387 U. S. 369 (1967); *Griffin v. County School Board of Prince Edward County,* 377 U. S. 218 (1964); *Gomillian v. Lightfoot,* 364 U. S. 339 (1960) (Whittaker, J., concurring).

As stated above, the Township concedes that its purpose in adopting the ordinance was to limit its percentage of non-white residents. The record supports such a concession. The Township's Exhibit D-1 showed the following statistics regarding the Township's racial composition (Petition for Certiorari, App. A at 36; U. S. C. A. Joint Appendix at 128a):

WILLINGBORO TOWNSHIP

Year	*Total Popul.*	*White Popul.*	*Black Popul.*	*Other Popul.*	*Non-White Popul.*	*Percent Non-White*
1950	852	Unavail.	Unavail.	Unavail.	Unavail.	Unavail.
1960	11,861	11,801	6	54	60	.005
1970	43,414	38,326	4,738	350	5,088	.117
1973	44,607	36,485	7,637	485	8,122	.182

The Township's witness, council member and former Mayor William J. Kearns, Jr., testified on direct examination:

> Q. Were you, prior to the winter of '73-'74, able to obtain a feeling on the community sentiment with respect to for sale signs in the township?
>
> A. I believe so, yes.
>
> Q. And what was that opinion at that time?

A. I think there was very definitely a feeling in the community that something should be done to prohibit real estate signs in the community.

. . .

. . . I discussed it with a number of people, and I think that the concern that was generally expressed was that people in the community were expressing a desire to sell their homes and move to other areas of Burlington County because what they sensed was a lack of stability or a large turnover in the community, and that this large turnover was resulting in a substantial influx of minority groups into the community beyond what could be sustained without the community itself turning into a ghetto within the county.

. . .

I don't think anyone was concerned with people of minority groups moving into the community or reaching a 20 percent, or even somewhere in the range of 20 to 25 percent minority grouping. They felt this was properly a generally average throughout the Delaware Valley area.

But they did feel that if we had a situation where white home owners in the community were moving, not because they were transferred or not to move to a larger home or a smaller home, for other economic reasons, but were moving because what they sensed was the reaction of the community, but that we would wind up with Willingboro hitting beyond the point of minority group population that would turn it into an isolated pocket of minority groups in Burlington County. It would no longer reflect an integrated community, but would become a ghetto. [U. S. C. A. Joint Appendix at 179a-182a].

This evidence, along with substantial other evidence detailed carefully in the dissenting opinion of Judge Gibbons in the Court of Appeals (Petition for Certiorari, App. A at 35-46), shows clearly that the Township's purpose was to remain predominately-white. Under the authority cited above, the "For Sale" sign ban, reflecting that purpose, violated the Fourteenth Amendment's guarantee of equal protection.

CONCLUSION.

For the reasons stated, the judgment of the Court of Appeals should be reversed. The District Court's judgment, declaring unconstitutional the ordinance banning "For Sale" signs, should be reinstated.

Respectfully submitted,

JOHN P. HAUCH, JR.,
ARCHER, GREINER & READ,
A Professional Corporation,
One Centennial Square,
East Euclid Avenue, Box 331,
Haddonfield, New Jersey. 08033
Counsel for Petitioners.

THOMAS L. EARP,
On the Brief.

Supreme Court, U. S.
FILED
JAN 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-357

LINMARK ASSOCIATES, INC. and
WILLIAM MELLMAN,

Petitioners,

v.

THE TOWNSHIP OF WILLINGBORO and
GERALD DALY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

MYRON H. GOTTLIEB,
KESSLER, TUTEK and GOTTLIEB,
Counsel for Respondents,

325 Farnsworth Avenue,
Bordentown, New Jersey 08505

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

TABLE OF CONTENTS

Questions Presented 1

Statement of the Case 2

A. Historically Willingboro's housing pattern has been fully integrated 2

B. Whenever racial conflict emerged, Township Council acted positively to minimize and, hopefully, eliminate any discord 3

C. To combat a developing fear psychology, Township Council prohibited "for sale" signs 3

D. Several reasons were expressed by a Township Council for approving the ordinance, including a desire to maintain an integrated housing pattern in the community 6

E. After adoption of the ordinance, the fear psychology subsided although as many homes were being sold after as before the ordinance was adopted 7

F. The District Court concluded that the ordinance was unconstitutional while the Court of Appeals disagreed 8

Summary of Argument 10

ARGUMENT:

I. Willingboro Township Council acted properly in prohibiting "for sale" signs 12

A. The provision and maintenance of open housing is a national goal 12

B. Preservation of integration is consistent with open housing 16

TABLE OF CONTENTS

ARGUMENT:

C. Segregated housing has practical ramifications which cannot be tolerated 17

D. Experience has shown that human fears often turn integrated communities into resegregated ones 18

E. Willingboro was showing the symptoms of the initial stage of resegregation and effectively acted to retard this movement 20

II. An ordinance prohibiting "for sale" signs in an effort to combat a fear psychology leading to the resegregation of a community does not violate the first and fourteenth amendments 27

A. Willingboro's ordinance advances a significant governmental interest—the halting of resegregation 28

B. Willingboro's ordinance, in advancing a significant governmental interest, is a reasonable restriction on commercial advertising 29

Conclusion 36

Exhibit A 37

CASES CITED:

Barrick Realty, Incorporated v. City of Gary, Indiana, 491 F.2d 161 (7 Cir. 1974) 21, 26

Bigelow v. Virginia, 421 U.S. 809 (1975) 27-28, 32

TABLE OF CONTENTS

CASES CITED:

Browns v. State Realty Company, 304 F. Supp. 1236 (N.D. Ga. 1969) 21

Buchanan v. Warley, 245 U.S. 60 (1917) 13

Chicago Real Estate Board v. City of Chicago, 36 Ill.2d 530, 224 N.E.2d 793 (Sup. Ct. 1967) 34

Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), aff'd per curiam 457 F.2d 788 (5 Cir. 1972) 17

DeKalb Real Estate Board v. Chairman and Board of Commissioners of Roads and Revenue for DeKalb County, 378 F. Supp. 748 (N.D. Ga. 1973) 27

Elfbrandt v. Russell, 384 U.S. 11 (1966) 30

Garrett v. City of Hamtramck, 357 F. Supp. 925 (E.D. Mich. 1973) 14

Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) 30

Harmon v. Tyler, 273 U.S. 668 (1927) 13

Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969) 14

Jones v. Alfred H. Mayer Co, 392 U.S. 409 (1968) 15

Kovacs v. Cooper, 336 U.S. 77 (1949) 31

TABLE OF CONTENTS

CASES CITED:

Lehman v. City of Shaker Heights,
418 U.S. 298 (1974) 30

Levitt and Sons, Inc. v. Division Against Discrimination in the State Department of Education,
31 N.J. 514, 158 A.2d 177 (1960), appeal dismissed,
363 U.S. 418 (1960) 2, 12

McLaurin v. Oklahoma State Regents for Higher Education,
339 U.S. 637 (1950) 15

Milliken v. Bradley,
418 U.S. 717 (1974) 17

National Association for the Advancement of Colored People v. Button,
371 U.S. 415 (1963) 30

Near v. Minnesota,
283 U.S. 697 (1939) 30

Norwalk CORE v. Norwalk Redevelopment Agency,
395 F.2d 920 (2 Cir. 1968) 14

Otero v. New York City Housing Authority,
484 F.2d 1122 (2 Cir. 1973) 20

Packer Corporation v. Utah,
285 U.S. 105 (1932) 31

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,
413 U.S. 376 (1973) 30, 34

Schenck v. United States,
249 U.S. 47 (1919) 29

TABLE OF CONTENTS

CASES CITED:

Shannon v. United States Department of Housing and Urban Development,
436 F.2d 809 (3 Cir. 1970) 13

Shelley v. Kraemer,
334 U.S. 1 (1948) 13

Summer v. Township of Teaneck,
53 N.J. 548, 251 A.2d 761 (1969) 29

Sweatt v. Painter,
339 U.S. 629 (1950) 15

Trafficante v. Metropolitan Insurance Co.,
409 U.S. 205 (1972) 14, 17

United States v. Bob Lawrence Realty, Inc.,
474 F.2d 115 (5 Cir. 1973), cert. denied, 414 U.S. 826 (1973), rehearing denied, 414 U.S. 1087 (1973) 12, 34

United States v. Bob Lawrence Realty, Inc.,
313 F. Supp. 870 (N.D. Ga. 1970) 34-35

United States v. Hunter,
459 F.2d 205 (4 Cir. 1972), cert. denied,
409 U.S. 934 (1972), rehearing denied,
413 U.S. 923 (1973) 12

United States v. Mintzes,
304 F. Supp. 1305 (D. Md. 1969) 35

Valentine v. Chrestensen,
316 U.S. 52 (1942) 30

Village of Belle Terre v. Boraas,
416 U.S. 1 (1974) 31

CASES CITED:

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 728 (1976) 28

Young v. American Mini Theatres, Inc., – U.S. –, 49 L.Ed.2d 310 (1976) 31, 34

STATUTES CITED:

42 U.S.C. §3604 ..... 2, 12, 34

42 U.S.C. §3610 14

N.J.S.A. 10:5-1 et seq. 12, 34

N.J.S.A. 10:5-10 3

N.J.S.A. 10:5-12(k) 34

UNITED STATES CONSTITUTIONAL PROVISIONS:

Amendment I ..... passim

Amendment XIV ..... passim

OTHER AUTHORITIES CITED:

Bradburn, Sudman and Gockel, Side By Side—Integrated Neighborhoods in America (1971) .. 19

Conser, Human Rights and the Realtor (1963) 19

Cosseboom, Grosse Pointe, Michigan—Race Against Race (1972) 19

Glazer, Affirmative Discrimination—Ethnic Inequality and Public Policy (1975) 18, 19

OTHER AUTHORITIES CITED:

Grodzins, The Metropolitan Area as a Racial Problem (1958) 20

Johnson, Call Me Neighbor, Call Me Friend: The Case History of the Integration of a Neighborhood on Chicago's South Side (1965) 13

Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (1944) 13, 18

Report of the United States Commission on Civil Rights, Equal Oportunity in Suburbia (1974) .. 18

Schelling, A Process of Residential Segregation: Neighborhood Tipping, Racial Discrimination in Economic Life (1972) 21

Taeuber and Taeuber, Negroes in Cities (1965) 19

Wolf, "The Tipping Point in Racially Changing Neighborhoods," 29 American Institute of Planning Journal 217 21

QUESTIONS PRESENTED

1. Is Willingboro Township's ordinance, adopted to restrain an existing fear psychology which was threatening to destroy its integrated residential housing, and affecting only present but not prospective community residents, permissible under the equal protection clause of the Fourteenth Amendment?

2. Is Willingboro's ordinance prohibiting residential "for sale" signs a permissible restriction on commercial speech, where the restriction furthers a superior governmental interest and is the minimum limitation necessary to accomplish that purpose?

STATEMENT OF THE CASE

A. *Historically Willingboro's housing pattern has been fully integrated.*

Willingboro Township is a community of approximately 45,000 residents located in Burlington County, New Jersey (U.S.C.A. Joint Appendix 128a).[1] Its significant residential development commenced in the late 1950's and is attributable mainly to Levitt and Sons, Inc. (Jt. App. 182a). At the outset Levitt refused to sell its homes to minority group members. But, before the Township had a chance to develop along segregated lines, this racially-based practice was enjoined by the New Jersey Supreme Court. *Levitt and Sons, Inc. v. Division Against Discrimination in the State Department of Education*, 31 N.J. 514, 158 A.2d 177 (1960), *appeal dismissed*, 363 U.S. 418 (1960). Immediately thereafter, Levitt instituted a policy of actively encouraging the development of the Township as an integrated community (Jt. App. 182a).

As a result, Willingboro now has a totally integrated housing pattern. None of the ten different areas or "parks" (*i.e.*, Millbrook Park, Buckingham Park, Garfield Park, etc.) constituting Willingboro can be denominated a "white section", a "black section" or a "Spanish-speaking section"; each park contains a diversity of almost all racial and ethnic groups living together (Jt. App. 183a; 214a; 246-7a). As indicated in the decision below, "a close approach was achieved to that housing ideal sought by fair-minded citiezns, mandated by the federal Fair Housing Act, 42 U.S.C. §3604, and impelled by our Constitution." 535 F.2d at 789.

1 Hereinafter, for purposes of brevity, references to the Joint Appendix utilized in the Court of Appeals will merely be cited as "Jt. App."

B. *Whenever racial conflict emerged, Township Council acted positively to minimize and, hopefully, eliminate any discord.*

In the late 1960's racial problems and conflict surfaced in Willingboro. Township Council, the governing body of Willingboro Township, responded in several ways. One action taken was the creation of the Willingboro Human Relations Commission (Jt. App. 183a; 231a). That body is statutorily charged with attempting "to foster through community effort or otherwise, good will, cooperation and conciliation among the groups and elements of the inhabitants of the community" and was empowered by Township Council "to make recommendations to [Township Council] for the development of policies and procedures in general and for programs of formal and informal education that will aid in eliminating all types of discrimination based on race, creed, color, national origin, ancestry, age, marital status or sex." *N.J.S.A.* 10:5-10.

The Township also became a member of National Neighbors, an organization promoting integrated housing and discussing ways to overcome problems inherent with this action (Jt. App. 183a).

Despite these actions, not all of the racial problems in Willingboro were solved. Specifically, complex psychological problems due to the mobility of Willingboro's suburban residential population persisted.

C. *To combat a developing fear psychology, Township Council prohibited "for sale" signs.*

The Fort Dix Military Reservation and McGuire Air Force Base are both located close to Willingboro and many of Willingboro's residents are either stationed at or are civilian employees at these installations. This fact

alone imposes a certain transient nature on the community. However, when to this are added the usual reasons for residents being required to relocate (job transfer, change in family size or personal financial circumstances), the intense competition by over eighty realtors' offices for the sale of homes in Willingboro, and the uniformity and proximity of residential construction, the proliferation of "for sale" signs and the documented reluctance of realtors to remove "sold" signs after they were up for five days, contrary to the prior ordinance, helped to create the impression that many people were leaving the community (Jt. App. 233a). As a result, a fear psychology developed among many home owners. A former chairperson of the Human Relations Commission, Valerie Gladfelter indicated that:

> "People expressed concern on seeing large numbers of for sale signs that neighborhoods would undergo rapid racial change, and this was a cause of worry to them" (Jt. App. 233a).

Councilman William Kearns described the fear psychology in another way:

> ". . . [P]eople in the community were expressing a desire to sell their homes and move to other areas of Burlington County because what they sensed was a lack of stability or a large turnover in the community, and that this large turnover was resulting in a substantial influx of minority groups into the community beyond what could be sustained without the community itself turning into a ghetto within the county.
>
> "People would indicate that: 'Everybody on my street is moving. I've got to get out of this town before it's too late.'
>
> "People would express a concern of: 'With all the turnover, my property value is going to go down. I got to get out'" (Jt. App. 181a).

Councilman Steven Heath related that:

> "You know, when you are a property owner, whether the sales are going or not, you have a general opinion. You drive around. People would see a lot of signs. They would say: 'Everybody wants to sell. This must be because there are too many blacks in town; and if we don't do something about it, boy it's just going to go, and let's sell and get out now'" (Jt. App. 207a).

While Township Council accorded no rationality to this prevailing attitude, it was faced with a psychological problem to which it believed it must respond (Jt. App. 181a). The Human Relations Commission, after an investigation noting the increasing panic selling resulting from the fear psychology, recommended to Township Council that "for sale" signs be prohibited in residential areas of the Towwnship. Alexander Porter, one of the members of the Human Relations Commission, described the reasoning behind the recommendation:

> "I think the Commision would like to see a community which is as harmonious as it would choose to be without the kind of pressures, if I may use that term, which would induce people to sell when in fact they don't want to sell; and I think that's the thing that the ordinance was directed at.
>
> "Individuals were responding and reacting to a rash of signs, or one sign which would lead to another, and another and another.
>
> "I think that's the concern the Commission was trying to address.
>
> "If the neighborhood was or is to be all black, and if that is a decision by choice, of the individuals involved, then the Commission I believe would have no concern about that. But if neighbors, residents of the township are being pushed into this kind of

> thing by the presence of a sign or signs, then I think the Commission's concern would be that that not ought to be, this is not the free choice that people ought to exercise, should exercise" (Jt. App. 244a-245a).

Township Council investigated how similar ordinances had worked in other municipalities (Jt. App. 120a-121a; 184a-185a). It held two public hearings, one before and one after the drafting of the ordinance under review (Jt. App. 186a). The ordinance prohibiting "for sale signs was adopted on March 18, 1974.

D. ***Several reasons were expressed by Township Council for approving the ordinance, including a desire to maintain an integrated housing pattern in the community.***

While several reasons for the enactment of the ordinance appear in the record, two of them predominate: (1) to minimize the fear psychology which had developed in the residents of the Township because of the proliferation of "for sale" signs; and (2) to maintain an integrated housing pattern in the community (Jt. App. 181a; 182a; 191a; 200a-201a; 207a; 210a; 218a). Other less significant reasons given are the difficulty in administrative enforcement of the previous ordinance requiring removal of a "sold" sign after five days, and aesthetic considerations (Jt. App. 188a; 200a; 209a; 209a-210a).

There was no testimony to the effect that a motive was to restrict the number of minority residents residing in Willingboro. Indeed, the evidence was to the contrary. Councilman Kearns testified that:

> "Q In your discussion in council, was it ever your feeling that council was utilizing this ordinance to restrict minority groups from moving into town?
>
> "A Absolutely not.
>
> "Q Blacks, Spanish persons, what-have-you?
>
> "A Absolutely not. We were trying to prevent the emotional reaction on the part of sellers. It was in no way related to people moving into the community" (Jt. App. 185a).

Similarly, Councilman Heath commented that he had "no preconceived notion as to what the percentages of people ought to be." (Jt. App. 214a).

The Chairman of the Human Relations Commission, the Reverend Ernest Lyght, testified that "balance" could not be equated with a ratio and had no numerical connotation; rather it was "[s]imply the openness and ability to live in the community and anywhere in the community one chooses." (Jt. App. 249a).

E. ***After adoption of the ordinance, the fear psychology subsided although as many homes were being sold after as before the ordinance was adopted.***

Two real estate brokers testified on the number of homes being sold in Willingboro before and after the adoption of the ordinance under review. One indicated that there was no significant change (Jt. App. 163a) while the other believed there was an increase in sales (Jt. App. 222a). There was no testimony indicating a diminution in sales. Yet everyone agreed that the ordinance had resulted in a decrease in the previously existing fear psychology (Jt. App. 163a; 191a-192a; 208a; 222a-223a; 234a; 241a-242a; 248a-249a; 250a).

F. *The District Court concluded that the ordinance was unconstitutional while the Court of Appeals disagreed.*

Suit was commenced by a realtor and by a corporation owning a home in Willingboro.[2] (Jt. App. 1a). After a two day trial, the District Court for the District of New Jersey concluded that the ordinance was unconstitutional, holding that (1) "the ordinance brings about a serious denial of a property owners [sic] right to freely and reasonably express to others the desire to sell in violation of the First Amendment" and (2) "in its application the Willingboro ordinance results in an infringement upon the fundamental right to travel."

On appeal, the United States Court of Appeals for the Third Circuit, in a two to one decision, reversed the District Court decision and upheld the constitutionality of the ordinance. That Court concluded that while commercial speech was entitled to First Amendment protection, in assessing and balancing the interests involved, "[t]he preservation of a desirable community impels a priority of the community's needs over commercial transactions in the community as they see fit, so long as those community needs are reasonably established and the means chosen to meet them do not infringe upon the fundamental constitutional rights of individual businessmen." It then determined that "the limited denial occasioned by the ordinance herein [resulted] from a reasonable exercise of the police power in furthering the public welfare by forestalling panic selling and its offspring, segregation." Finally, the Court found that "[s]ellers are free to sell to any economically qualified buyer. Economically qualified buyers of

2. A review of the deeds on file in the office of the Burlington County Clerk discloses that the subject property was subsequently sold on April 21, 1976.

any racial group are free to buy any home in any section of Willingboro. No burden on commerce or a deterring influence on the individual right to migrate has been shown."

SUMMARY OF ARGUMENT

Willingboro Township is a community which exemplifies the proposition that people of differing racial, religious and ethnic backgrounds can live together. When it became apparent that there was a growing fear psychology threatening a change from an open, integrated community to a resegregated one, and that the proliferation of "for sale" signs was the direct cause of this fear psychology, Township Council adopted an ordinance prohibiting "for sale" signs.

I.

Society has a significant interest in maintaining an integrated community such as Willingboro. When "minority enclaves" develop, serious consequences ensue, ranging from ghettoization, with its resultant tensions and violence, to a diminution of economic opportunity, to added costs to society generally to overcome the handicaps associated with a separation of minorities. That interest is so important that reasonable action taken to prevent the resegregation of a community must be upheld.

II.

The problem of racial residential succession, accelerated by a fear psychology, was identified by Township Council. The proliferation of "for sale" signs was diagnosed as the cause of the problem. Township Council was very concerned because Willingboro had achieved and highly valued its full residential integration. Its action in adopting the ordinance was an attempt to maintain these values.

III.

The ordinance adopted by Township Council did not attempt to establish a quota on the number of minority

group members who may reside in Willingboro. Its impact was not on prospective residents, since the absence of "for sale" signs did not preclude the purchase of homes, other avenues to obtain this information being readily available. Nor can it be cogently asserted that the prohibition of "for sale" signs was aimed at prospective minority group residents, since the absence of "for sale" signs pertained to all prospective residents. The impact of the ban of "for sale" signs was solely on present residents of the community and only affected them to the extent that it would remove an emotional cause for wanting to leave Willingboro.

IV.

The ordinance resulted in a significant reduction in the fear psychology and eliminated an artificial challenge to the maintenance of an integrated community.

V.

Commercial speech, while entitled to First Amendment protection, may be restricted when it conflicts with a paramount governmental interest. Where commercial speech, because of the way the public generally perceives it, results in a situation antithetical to a paramount governmental interest, it can be proscribed. So long as the governmental limitation is the minimum interference reasonably necessary to protect the affected public interest, there is no violation of the First Amendment. The content of the particular commercial speech is a factor in determining the extent of its protection.

ARGUMENT

I. Willingboro Township Council acted properly in prohibiting "for sale" signs.

A. *The provision and maintenance of open housing is a national goal.*

It is apparent that the provision and maintenance of open[3] housing is a national goal. Many statutes have been adopted to ensure progress toward this end. 42 U.S.C. §3604 makes unlawful certain activity which would inhibit openness in housing "because of race, color, religion, sex, or national origin." Similar provision is available in New Jersey under *N.J.S.A.* 10:5-1 *et seq.*, the Law Against Discrimination.[4] The civil rights granted by these enactments have been diligently enforced in both Federal and New Jersey judicial forums. For example, see *United States v. Hunter*, 459 F.2d 205 (4 Cir. 1972), *cert. denied*, 409 U.S. 934 (1972), *rehearing denied*, 413 U.S. 923 (1973); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5 Cir. 1973), *cert. denied*, 414 U.S. 826 (1973), *rehearing denied*, 414 U.S. 1087 (1973); *Levitt and Sons, Inc. v. Division Against Discrimination in the State Department of Education, supra.*

While the goal of open housing must place primary reliance on the United States Constitution, the objective as implemented does not date back to the ratification of the Constitution or even to the mid-Nineteenth Century and the adoption of the Fourteenth Amendment. Rather,

3. The term "openness" was used by the chairman of the Human Relations Commission, the Reverend Ernest Shaw Lyght, as being "the ability to live in the community and anywhere in the community one chooses" (Jt. App. 249a). This definition of "openness" shall be the one utilized in this Brief.

4. It should be noted that on the second page of the real estate listing agreements, Exhibits P-4 and P-5, is reproduced a Memorandum from the Attorney General of New Jersey explaining a property owner's responsibilities under the Law Against Discrimination (Jt. App. 125a; 127a).

its expression is one of the Twentieth Century, as our governmental institutions have responded to the needs of the people. In *Buchanan v. Warley*, 245 U.S. 60 (1917), this Court concluded that an ordinance of the City of Louisville, Kentucky, had as its purpose the compulsory separation of races. The ordinance was held to be unconstitutional under the Fourteenth Amendment. Ten years later, in *Harmon v. Tyler*, 273 U.S. 668 (1927), an ordinance forbidding a black from establishing a home in a white community or a white from establishing a home in a black community without the written consent of those residing in the particular areas was declared to be invalid. Twenty-one years passed until *Shelley v. Kraemer*, 334 U.S. 1 (1948), where it was held that a restrictive covenant which excluded "people of the Negro or Mongolian Race" from the occupancy of real estate for residential purposes could not be enforced in a state court, since it would be violative of the Fourteenth Amendment.

From this somewhat sparse, although consistent, background of judicial decisions, in conjunction with Congressional enactments, developed the national policy of open housing. However, there was an added ingredient. While before World War II, the policy was proscriptive in character, merely declaring what could not be done, after that event, the policy became more positive, developing into a concept of what should be done.[5] This has led to a multitude of judicial decisions, each serving to further articulate this dynamic policy of openness in housing and its handmaiden, integration. These cases range from *Shannon v. United States Department of Housing and Urban Development*, 436 F.2d 809 (3 Cir. 1970), requiring an urban

5. Changes in our national policies toward minorities have, according to some, a direct relationship with wars involving this country. See Johnson, *Call Me Neighbor, Call Me Friend: The Case History of the Integration of a Neighborhood on Chicago's South Side* (1965), 46; and Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (1944).

renewal plan to consider the effect of the change in the type of housing to be made available by the plan on the racial composition of the renewal area; to *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2 Cir. 1968), holding that a cause of action is alleged where individuals are displaced by an urban renewal project which did not plan for the relocation of blacks and Spanish-speaking displacees to the same extent that it did for whites; to *Garrett v. City of Hamtramck*, 357 F. Supp. 925 (E.D. Mich. 1973), determining that a city implementing an urban renewal project intentionally designed to have a greater effect on black residents would be responsible for securing proper housing for the displacees; to *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969), holding that low-cost housing should not be constructed at certain sites, the effect of which would be to perpetuate segregation in public housing. Each of these decisions illustrate the change to a positive approach in our national housing policy.

This policy was recognized by this Court in *Trafficante v. Metropolitan Insurance Co.*, 409 U.S. 205 (1972). In *Trafficante*, two tenants—one white and one black—at an apartment complex filed suit against the owner alleging a discrimination against nonwhites on the basis of race in the rental of apartments within the complex in violation of 42 U.S.C. §3610. They alleged injury based upon the loss of the social benefits of living in an integrated community, the deprivation of business and professional advantages which would have accrued had they lived in an integrated community and the suffering of embarrassment and economic damage from being stigmatized as residents of a white ghetto. In recognizing a cause of action had been alleged, this Court observed that "the alleged injury to existing tenants by exclusion of minority persons from

the apartment complex is the loss of important benefits from interracial association." 409 U.S. at 209-210. See also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which held that 42 U.S.C. §1982 bars all racial discrimination, private as well as public, in the sale or rental of property.[6]

This Court's statement in *Jones*, in commenting upon the pledge of the Thirteenth Amendment, bears reiteration. Observing that "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery," this Court went on to say:

> "Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to 'go and come at pleasure' and to 'buy and sell when they please'—would be left with 'a mere paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a ppromise the Nation cannot keep." 392 U.S. at 443.

---

6. This Court's recognition of the positive nature of our national policy toward securing equal opportunity for minorities has, of course, not been solely confined to the area of open housing. For example, in the field of higher education, *Sweatt v. Painter*, 339 U.S. 629 (1950), held that a segregated law school for black students could not provide blacks with equal educational opportunities; and *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950), concluded similarly with respect to special racial regulations at a graduate school. It is interesting to note that this Court recognized specifically that the "restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." 339 U.S. at 641.

Accordingly, it is evident that open housing is not only a national goal but, indeed, a national priority.

B. *Preservation of integration is consistent with open housing.*

Petitioners have asserted that Willingboro, by regulating in order to maintain integration in the community, is acting contrary to the goal of open housing, which assumes unregulated freedom of choice. However, even a cursory analysis of this argument exposes its fallacy.

As noted, open housing may be defined as "the ability to live in the community and anywhere in the community one chooses" (Jt. App. 249a), subject only to financial considerations. Integration in housing, or the residing together of members of different racial, ethnic and religious groups in a community, does not interfere with the ability to purchase a home of one's choice. Prospective purchasers are not restricted from buying a home because a community is integrated, so long as no numerical quotas are established. Current residents are not precluded from living in a community because it has open housing. Living in an integrated community has an impact upon its residents, but it bars no prospective purchaser from living there.

Similarly, the assertion that the preservation of integration requires the use of numerical quotas is erroneous as well as being contrary to the record. Maintaining integration in an already integrated community is not dependent upon the numbers of a group represented. And the testimony at trial clearly indicated that this was not Township Council's intent or desire. Council only wanted to forestall a breakdown of Willingboro's integration based upon an emotional pressure, not rational consideration. This does not require the establishment of quotas.

C. *Segregated housing has practical ramifications which cannot be tolerated.*

Segregated, as opposed to integrated, housing does violence to everyone, whites, blacks and other minority group members alike. This was recognized by Congress and, through it, by this Court in *Trafficante, supra.* Segregated housing not only harms society because it precludes people from obtaining the benefits of a full interaction between various groups, but it also leads to other problems. For instance, in *Crow v. Brown,* 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam,* 457 F.2d 788 (5 Cir. 1972), in commenting upon the policies of governmental officials which furthered the concentration of public housing for low income blacks in the City of Atlanta and prevented construction of such housing beyond the City limits, the Court specified some of the effects of a continuation of these policies:

> "One of the consequences of this racial concentration is that it has become virtually impossible to achieve meaningful school desegregation. Indeed, as even a glimmering of objectivity will disclose, a dispersal of urban housing patterns is the only alternative to massive bussing if desegregation, rather than resegregation, is to be achieved. [Citation omitted]. A second consequence has been a swelling of the unemployment rolls in the City since job opportunities have become more scarce each year, although they have increased in the suburbs" 332 F. Sup. at 391.

The Court in *Crow* went on to take note of the report of the National Commission on Urban Problems, which indicated the possibility of increased tension and violence resulting in greater polarization of blacks and whites. See also *Milliken v. Bradley,* 418 U.S. 717 (1974).

However, segregated housing is not exclusively an urban problem. In the Report of the United States Com-

mission on Civil Rights, *Equal Opportunity in Suburbia* (1974), it was observed, at page 4, that, "[t]he decade of the sixties was one of increasing suburbanization of whites in metropolitan areas and of increasing concentration of blacks within central cities—in short, of increasing racial separation." Willingboro exists in marked contrast to this trend.

On the other hand, in Glazer, *Affirmative Discrimination—Ethnic Inequality and Public Policy* (1975), the author reflects upon the benefits accompanying integrated housing. Among these are an equalization of education achievement, better social relations and whatever follows from it, better housing for minorities and a more rapid improvement of the economic position of blacks.

D. *Experience has shown that human fears often turn integrated communities into resegregated ones.*

In *An American Dilemma: The Negro Problem and Modern Democracy* (1944), Gunnar Myrdal defined the "self-fulfilling prophecy:"

> "When a few Negro families do come into a white neighborhood, some more white families move away. Other Negroes hasten to take their places, because the existing Negro neighborhods are overcrowded due to segregation. This constant movement of Negros into white neighborhods makes the bulk of the white residents feel that their neighborhood is doomed to be predominantly Negro, and they move out—with their attitudes against the Negro reinforced. Yet if there were no segregation, this wholesale invasion would not have occurred. But because it does occur, segregational attitudes are increased, and the vigilant pressure to stall the Negroes at the borderline is kept up." Vol. I, at 623.

Examples of this process are endemic in recent literature. Some of the reasons have been related in Conser, *Human Rights and the Realtor* (1963), at page 9:

> "The white resident resists Negro encroachment and eventually moves because: (1) he believes his white neighbors will move sooner or later; (2) he believes that if he remains too long he will not be able to find a white buyer; (3) he believes that; under the circumstances, property values will drop; (4) he believes that if he remains his own social position will be adversely affected; (5) he prefers that his children's close associates and friends be of the same racial and similar religious background; (6) he is concerned about intermarriage and the added problems that it bring; (7) if he can readily move, he choses that way out as being preferable. The real estate broker who is charged with seeking a buyer soon finds that he cannot interest white families except as the property can be had at a bargain price or terms. Therefore, the seller easily concludes that his best interests are served by arranging a sale to a Negro family. And so that process of replacement starts—and with each sale continues inexorably until the last white family moves."

In Cosseboom, *Grosse Pointe, Michigan—Race Against Race* (1972), the fear reactions of whites to blacks moving into a previously all-white neighborhood are dramatically documented. In Bradburn, Sudman and Gockel, *Side By Side—Integrated Neighborhoods in America* (1971), a sociological study of integrated communities, many reactions of tension and panic are presented (commencing at page 64). Taeuber and Taeuber, *Negroes in Cities* (1965), reviews the pattern of racial residential succession (commencing at page 99). As noted in Glazer, *Affirmative Discrimination—Ethnic Inequality and Public Policy, supra,* at page 136: "Clearly, the separation into two

nations is proceeding apace." To paraphrase a familiar expression, fearful whites, like Arabs, have been folding their tents and silently stealing away.

E. *Willingboro was showing the symptoms of the initial stage of resegregation and effectively acted to retard this movement.*

It would be naive at best (and it could probably be more accurately classified as dangerous) for anyone to fail to recognize the existence of certain human frailties. In the context of this case, the human frailty is fear, fear of living in a community which is changing from integrated to segregated. That fear becomes more real, more apparent, more conscious as the "tipping point" comes closer. The tipping factor has been commented upon by many, including the judiciary. *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1124 (2 Cir. 1973), recognized the existence of a racial "tipping factor" causing white residents to take flight and leading eventually to non-white ghettoization of the community. Grodzins, *The Metropolitan Area as a Racial Problem* (1958), comments, at page 6, upon this phenomenon:

> "The process by which whites of the central cities leave areas of Negro in-migration can be understood as one in the social-psychology of 'tipping a neighborhood.' The variations are numerous, but the theme is universal. Some white residents will not accept Negroes as neighbors under any conditions. But others, sometimes willingly as a badge of liberality, sometimes with trepidation, will not move if a relatively small number of Negroes move into the same neighborhood, the same block, or the same apartment building. Once the proportion of non-whites exceeds the limits of the neighborhood's tolerance for interracial living (this is the 'tip point'), the whites move out."

See also Schelling, *A Process of Residential Segregation: Neighborhood Tipping, Racial Discrimination in Economic Life* (1972) and Wolf, "The Tipping Point in Racially Changing Neighborhoods," 29 *American Institute of Planning Journal* 217.

One of the factors which makes a tipping point so significant is the existence of a fear which gives rise to it and which results in panic selling. And the role of "for sale" signs as a catalyst of that fear has itself been recognized. See *Browns v. State Realty Company*, 304 F. Supp. 1236 (N.D. Ga. 1969) and *Barrick Realty, Incorporated v. City of Gary, Indiana*, 491 F.2d 161 (7 Cir. 1974). That factor and that catalyst existed in Willingboro.

Willingboro's stance toward open housing and integration was documented at the trial of this case. In Willingboro, white, black, Spanish-speaking and other minority residents live on the same street, on the same block. Willingboro, unlike so many other communities which profess to be integrated, does not restrict its minority residents to an enclave. This community-wide racial interspersion in housing has characterized Willingboro since the early 1960's. However, a fear psychology began to develop, based on the proliferation of "for sale" signs.

The brief of Petitioners asserts that there was no causal relationship between the "for sale" signs and the fear psychology (Petitioners' Brief-21). Petitioners do not refer to the record to substantiate this contention; rather, they attempt to reason that since a resident can be informed of the fact that a neighboring homeowner is selling his home, in other ways, whether through word of mouth, advertisements in newspapers and other media, seeing a moving van in front of the home or being aware of a new neighbor, "for sale" signs alone cannot cause the

fear psychology. Yet this analysis is contradicted by the proofs before the courts. In reality, the "for sale" signs and "sold" signs, maintained long after the five-day limitation established by the prior ordinance were the visible, daily reminders that neighbors were moving which launched and enforced the fear psychology. Township Council recognized this and acted to eliminate the fear psychology.

On the other hand, *amici* A.C.L.U. do not even admit the existence of the fear psychology (A.C.L.U. Brief 23). At best, *amici* concede that there was a "concern" on the part of Township Council that "for sale" signs would create a fear psychology. This contention, likewise, grossly understates the evidence at trial. The almost hysterical attitude of many of Willingboro's residents is amply documented in the record, specific portions of which are repeated in Section C of this Brief's Statement of the Case. Township Council was not conjecturing about the existence of a fear psychology. Township Council was advised by the Human Relations Commission that a fear psychology existed; Township Council members individually, through general discussions with members of the public, ascertained that a fear psychology existed; Township Council collectively held two public hearings at which its belief that a fear psychology existed was substantiated.

It became apparent that the result of the fear psychology would lead Willingboro away from being an integrated community to becoming a resegregated one. See Exhibit D-1 (Jt. App. 128a) showing the actual change in racial composition of the community. Township Council, after receiving a report from the Human Relations Commission, and after holding two public hearings on what should have been done, determined that the fear psychology was significant enough to warrant the adoption of the ordinance prohibiting "for sale" signs. And, clearly, the

desired objective was achieved: the fear psychology subsided. (Jt. App. 163a; 191a-192a; 208a; 222a-223a; 234a; 241a-242a; 248a-249a; 250a).

Councilman Kearns indicated that:

> "Prior to the ordinance, I've already indicated that I think the concern of the community and the reaction of the people are having, and I can—I know of particular cases that I've dealt with as an attorney, that people have indicated they are going to get out before it's too late, or they've seen a number of signs on their particular street.
>
> "I've had people come up and say: 'My God, there is three houses for sale on my street. What's happening? What's going on? I got to get out of here.'
>
> "We used to get that kind of reaction, and there has been a very noticeable elimination of that. And I think there are still some people who may indicate that they are moving because of concern for minority problems within the community. But it's dropped off to the point that in 1974, I don't think I could think of more than two or three people that I personally have dealt with that are moving for that reason. Most of the people that seem to be selling now are selling for business transfer reasons or because their families have grown and moved out and they want to get into a different type of house, or their families are growing and they need a larger home than they could get, or they've gotten interested in—Well, one family is interested in having a horse, which is rather difficult on our size of lots" (Jt. App. 191a-192a).

The former chairperson of the Human Relations Commission Gladfelter testified:

> "The feedback that I had gotten has been that people in the community like it better without the signs, that they feel less pressure on the community and they seem to make some connections between that and

> at least reported—less frequently reported kind of racial disturbance in the community" (Jt. App. 234a).

The Chairperson of the Human Relations Commission, Reverend Lyght, commented:

> "I think my specific response would have to be that it's fairly clear to me that the prohibition has stopped or brought to an end the kind of things that we used to hear of, people talking about the rapid change in the community, whether it was in fact or assumed.
>
> "They would, from time to time, have people raising questions with us, residents of the community in terms of the openness of the community, and using the signs as their way of saying that something is wrong. We're not getting this type of thing now" (Jt. Rpp. 250a).

Petitioners have asserted in their Brief that the intent of the ordinance was to further the "exclusion of racial minorities from the Township (Petitioner's Brief-9; 33). This allegation not only is unsupported by but contradicts the record. Further, this allegation attributes an improper objective to a local legislative body which has a demonstrated history of working to achieve a better, more open, integrated racial environment in Willingboro. Councilman Kearns testified that the ordinance "was in no way related to people moving into the community" (Jt. App. 185a). Councilman Heath, a member of the Executive Committee of the Burlington County Branch of the N.A.A.C.P., a member of the Kinsmen (a predominantly black fraternal organization), and a member of and legal counsel to the Spanish-American Club of Burlington County (Jt. App. 204a), not only stated that he had "no preconceived notion as to what the percentages of people ought to be" (Jt. App. 214a), but indicated that the

N.A.A.C.P. was among the strongest proponents of the ordinance (Jt. App. 209a).

Clearly, this is not a case of Township Council trying to keep anyone out of Willingboro, a town which has been proud of the fact that it is a community where all are welcome and live together. Township Council did not attempt to preclude all advertisement of the availability of homes for purchase, since, clearly, these other methods did not produce the "uptightness" or fear psychology resulting from the abundance of "for sale" and "sold" signs. It is ironic in this respect that in a Motion for Summary Judgment made by Petitioners before the trial of this matter, which Motion was denied, the argument was advanced that since the ordinance still permitted "for sale" signs on newly-constructed homes, there was a denial of equal protection to Petitioners, neither of whom owned a newly-constructed home. This assertion was abandoned before trial when it became evident that the continuation of the ordinance authorization to maintain "for sale" signs on such homes was indicative of Township Council's intent not to prohibit individuals from buying homes in Willingboro. In fact, this obviously strengthened Township Council's contention that the ordinance was only enacted to affect present residents of the community and only to the extent that it would remove the constant prod festering the fear psychology represented by the "for sale" and "sold" signs.

The proofs at trial showed that there was no frustration of the ability of prospective purchasers to buy homes in Willingboro. The uncontradicted testimony was to the effect that as many homes were being sold after the adoption of the ordinance as before, the only change being that residents were now selling their homes for reasons of job transfer, need for a different size home because of change in family size, etc., not because they were fearful that the

community was "changing" into an all-black enclave. In *Barrick Realty, Incorporated v. City of Gary, Indiana*, supra, 491 F.2d at 164, the Court commented:

> "Unquestionably, the municipal interests which justify the restriction of commercial activity in residental neghborhoods support a prohibition against the display of commercial signs. See *Euclid v. Ambler Co.*, 272 US. 365, 387-397. The City's interest in attempting to encourage and maintain stable integrated neighborhoods provides important added support. Since the record does not indicate that the ordinance has frustrated the ability of prospective buyers to find the homes in Gary which are for sale, and since alternative means of communication are available to the plaintiffs, the regulation is permissible."

The same policy considerations are applicable as well to Willingboro.

The fact that the ordinance was not aimed at maintaining any particular racial "quota" is strengthened by the recognition that in reality the prohibition of "for sale" signs did not result in keeping any prospective minority group residents out of Willingboro. Attached to this Brief as Exhibit "A" is a copy of the most recent school population survey results in Willingboro required to be compiled under New Jersey administrative law. While Township Council does not contend that there is any direct, absolute ratio between the number of minority families living in Willingboro and the number of children of school age that they may have, the attachment does show a continued increase in the number of black youngsters attending Willingboro's public schools since the adoption of the ordinance. If the object was to keep blacks and other minorities out of Willingboro, it has not succeeded; nor was it Township Council's intention to so exclude anyone.

Willingboro, as phrased by Councilman Heath, is a "great experiment," an experiment in people of all backgrounds, races and religions living together amicably. What Township Council intended was to permit the experiment to continue, if it could, by removing an artificial "germ" ("for sale" signs) afflicting the community's health and eliminating its symptom (the fear psychology). Willingboro wanted to permit its residents to remain, not in order to maintain a numerical balance or ratio of whites and non-whites, but to prevent the "great experiment" from foundering because of an artificially imposed pressure. Petitioners quote part of the opinion of the District Court, which speculated that the ordinance would have the "ultimate effect of freezing in past discrimination, denying blacks a fair opportunity to find suitable housing," citing *DeKalb Real Estate Board v. Chairman and Board of Commissioners of Roads and Revenue for DeKalb County*, 378 F. Supp. 748 (N.D. Ga. 1973) (Petitioners' Brief-34). It should be quite apparent that Willingboro never had any great past discrimination to freeze in.

Willingboro does not wish to become another Camelot, "a fleeting wisp of glory"; Willingboro does not want to become just another dead monument to the cause of brotherhood and better race relations; it wants to be a living example that all people can live together.

II. An ordinance prohibiting "for sale" signs in an effort to combat a fear psychology leading to the resegregation of a community does not violate the first and fourteenth amendments.

Although Petitioners sought certiorari by asserting that Willingboro's ordinance conflicted "with the principles established by the decision of this Court in *Bigelow v.*

Virginia, 421 U.S. 809 (1975)" (Petition for Writ of Certiorari-6), apparently Petitioners have now concluded, in agreement with Willingboro, that *Bigelow* does not render the ordinance unconstitutional. Petitioners have, accordingly, shifted their approach, relying principally upon *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). A review of this and other cases cited by Petitioners will show support for, not disputation of, Willingboro's ordinance.

A. *Willingboros' ordinance advances a significant governmental interest—the halting of resegregation.*

It is clear that *Virginia State Board of Pharmacy* held that commercial speech is not *wholly* outside the protection of the First Amendment (425 U.S. at 762); it is also evident that protected commercial speech may in certain instances be restricted, consistent with the First Amendment. These permissible limitations include "time, place and manner" restriction, prohibitions on false or misleading advertisements and proposals of illegal transactions.[7] In our view, the proper test to be applied to Willingboro's ordinance is to determine whether or not there is a paramount governmental interest, accomplished with minimal restrictions appropriate to its purpose. We submit that the governmental interest in combating the fear psychology leading to the resegregation of Willingboro requires the ordinance to be upheld.

As indicated in Part I of this Argument, there is a significant governmental interest in maintaining a truly integrated community. The problems of our present society

7. This Court discussses these and other inroads into absolute protection in Part VI of its decision in *Virginia State Board of Pharmacy*. See also the concurring decisions of Chief Justice Burger (425 U.S. at 773) and Justice Stewart (425 U.S. at 775).

in implementing openness in housing, furthering integration and halting resegregation have been discussed in detail in many judicial decisions and scholarly commentaries and have been noted in summary manner in this Brief. Obviously, this is one of the more momentous issues facing our nation. Willingboro's ordinance, in seeking a positive answer to these problems, attempts to further this governmental interest.

The Brief of *amici* A.C.L.U. rejects the assertion that the ordinance advances a significant governmental interest, yet agrees that restrictions on advertising are permissible "when public health and safety necessitate" them (A.C.L.U. Brief-16). Perhaps a nonenunciated reference to the classic situation of a person shouting "fire" in a crowded room and causing panic is meant. See *Schenck v. United States*, 249 U.S. 47, 52 (1919). In any event, it is clear that this limitation of the phrase "public health and safety" cannot be condoned, and that in view of the gravity of the public policy at issue, the public health and safety must include the propriety of action reasonably taken to halt resegregation. Moreover, the words "public health and safety" are usually in the tripartite phrase "public health, safety and welfare." In employing the full phraseology, the efficacy of Willingboro's position becomes additionally evident.[8]

B. *Willingboro's ordinance, in advancing a significant governmental interest, is a reasonable restriction on commercial advertising.*

As indicated, the governmental interest in preventing that which would result in the resegregation of a commu-

8. See *Summer v. Township of Teaneck*, 53 N.J. 548, 551, 251 A.2d 761 (1969), where the New Jersey Supreme Court, in discussing "blockbusting," observed that: "the present setting of racial discord magnifies the insult to the public well-being."

nity is of great moment. This Court has recognized the propriety of restricting First Amendment rights when the mode of expression sought to be curtailed effects a result contrary to the public policy. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), this Court declined to modify *Valentine v. Chrestensen*, 316 U.S. 52 (1942), because of the public significance attached to sex discrimination in employment "want ads." 413 U.S. at 388. In *Near v. Minnesota*, 283 U.S. 697, 718 (1939), Chief Justice Hughes observed that: "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." It is the relative significance of the conflicting interests involved which are "important in determining the degree of protection afforded by the (First) Amendment to the speech in question." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-3 (1974).

Official action with an adverse impact on First Amendment rights may be justified by a compelling or paramount public interest. *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415, 438 (1963); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963).

It is apparent that a paramount public interest is involved in this case. And it is similarly evident that the ordinance imposes the minimum restrictions necessary to accomplish the purpose. See *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966). Advertisement generally of residences available for purchase was not prohibited; only restrained was the one method giving rise to panic selling—"for sale" and "sold" signs.

In this regard, the distinction between advertising in general and "for sale" and "sold" signs on the front lawns

of residential streets should be noted. Residential areas are "a sanctuary for people," *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974), not ordinarily characterized by commercialism. "For sale" and "sold" signs seek to impose an aspect of commercialism on "the quiet and tranquility of residential thoroughfares." *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). Residents going to and from their homes have the "for sale" and "sold" signs thrust upon them, even if it is just to walk down the sidewalk to visit with a neighbor, to walk a youngster to school or to take a baby for a ride in a carriage. This imposition of commercialism, not otherwise permitted by the ordinance, intrudes upon residents in a place they do not normally anticipate. See also *Packer Corporation v. Utah*, 285 U.S. 105, 110 (1932), which, in the context of the Fourteenth Amendment, discusses the difference between billboards or signs and other types of advertising.

In *Young v. American Mini Theatres, Inc.*, — U.S. — , 49 L.Ed.2d 310 (1976), an ordinance requiring the dispersal of adult motion picture theaters was upheld. It was noted that a restriction requiring at least a one thousand foot separation between theaters would not "create an impermissible restraint on protected communication" since "[t]he city's interest in planning and regulating the use of property for commercial purposes is clearly adequate to support that kind of restriction applicable to all theaters within the city limits." 49 L.Ed.2d at 30. Willingboro's ordinance, likewise, considers the propriety of advertisement in general versus the propriety of advertisement in a residential zone.

Young also makes it clear that the "content of a particular advertisement may determine the extent of its protection." While the prohibition of "for sale" signs is primarily aimed at the mode of expression rather than its

content, other modes being left unaffected, an analysis will show that the signs are restricted only in part because of their content. Thus, in Willingboro's situation, a hybrid is presented: signs generally did not cause the fear psychology; the advertisement of homes for sale by methods other than signs did not cause the fear psychology; only "for sale" and "sold" signs caused it. This classification of advertisement, based in part on its content, is permitted when weighed against Willingboro's "interest in the present and future character of its neighborhoods . . ." 49 L.Ed.2d 327. As observed by Justice Powell in his concurring opinion in *Young*, "[w]ithout stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values." Society's interest in protecting established residential integration from the fear psychology stemming from "for sale" signs is like the social interests upheld by this Court in *Young*. The free speech interest at stake here, as in *Young*, "is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment." 49 L.Ed. 2d 326.

Virginia State Board of Pharmacy is not to the contrary. There the public had a "strong interest" in the free flow of information on the comparative prices of prescriptive drugs. Nor is this the complete suppression involved in *Virginia State Board of Pharmacy*. Further, as noted in *Virginia State Board of Pharmacy*, the advertisement in *Bigelow v. Virginia, supra*, "related to activity with which, at least in some respects, the State could not interfere."

The argument of Petitioners that on-premises "for sale" signs are uniquely effective is without merit. The argument relates that the signs, being on site, advertise

"as completely and honestly as any advertising is likely to accomplish" (Petitioners' Brief-27). Of course, this assumes that prospective purchasers, who learn about the availability for purchase of a home through other means, will not choose to view it in person. Petitioners' other assertion that the absence of "for sale" signs will "force the individual citizen to spend an inordinate quantity of time and resources to gain the same information" (Petitioners' Brief-28) defies common sense. Petitioners would have this Court believe that it is easier and quicker to drive around Willingboro to ascertain which homes are available for purchase than to review the central catalog of a realtor or to scan the "Homes for Sale" column in a newspaper. Further, this entire argument completely avoids the dominating presence of "sold" signs.

Amici A.C.L.U. argue that the public has an interest in knowing what homes are for sale in Willingboro, regardless of whether that information is causing a fear psychology leading to a resegregation of the community. *Amici* urge that the response to the fear psychology is "more, rather than less speech," or as Petitioners phrase it, "education."[9] But Willingboro has tried this response and it has not of itself worked. The record reflects a public meeting at the Presbyterian Church in Willingboro on "racial stability and racial problems" captioned "Willingboro—To Sell or Not To Sell" (Jt. App. 184a). Discussions were held before groups such as the Rotary Club, the Chamber of Commerce, and the Jaycees. Township Council joined National Neighbors for added information and had an actively working Human Relations Commission

9. According to the 1970 Census of Population, published by the United States Department of Commerce, the average educational level of residents of Willingboro twenty-five years of age or older was 12.6 years of school completed, and 78 per cent were high school graduates. The national average was 12.1 years of school completed, and 52.3 per cent had graduated from high school. Apparently, education *per se* is not sufficient to keep an individual from acting irrationally.

which is statutorily charged with this education function. Despite these efforts the fear psychology persisted. Willingboro could not wait; it did not have the luxury of being able to spend time individually educating or "indoctrinating" everyone. To argue that education alone may be used to combat fear psychology is to advance a position divorced from practical reality.[10] Willingboro cannot afford to close the barn door after the horse has escaped. The suggestion of *amici*, while worthy is not of itself sufficient: Willingboro requires that every constitutionally permissible means be available to achieve its paramount government interest in preserving residential integration.

Additionally, the speech represented by the "for sale" and "sold" signs is not worthy of constitutional protection when its actual result is the engendering of a fear psychology resulting in Willingboro's resegregation. *Chicago Real Estate Board v. City of Chicago*, 36 Ill. 2d 530, 224 .E.2d 793, 807 (Sup. Ct. 1967). In *Pittsburgh Press, supra*, it was observed that "[w]e have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." 413 U.S. at 388. Both of these activities are illegal. Yet a declaration that one must leave town because of that changing racial composition is equally illegal under the Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*; see *N.J.S.A.* 10:5-12 (k); 42 U.S.C. §3604 (e). Although the "for sale" signs do not expressly relate such an illegal statement, the effect in Willingboro of the abundance of "for sale" and "sold" signs was the same as if it were related. See *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5 Cir. 1973); *United States v. Bob Lawrence Realty,*

10. See also the comment in *Young v. American Mini Theatres, Inc., supra* that "broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached."

Inc., 313 F. Supp. 870 (N.D. Ga. 1970); and *United States v. Mintzes*, 304 F. Supp. 1305 (D. Md. 1969) (which held that there was a permitted restriction on free speech in an anti-blockbusting context). Signs which on the surface may be innocent but which, because of the way the public perceives them, result in a situation strongly contrary to the public interest should not be automatically afforded a superior Constitutional protection.

Willingboro's ordinance, having been enacted to further a significant public interest and being no more restrictive than necessary to accomplish its purpose, is therefore valid.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed and the constitutionality of Willingboro's ordinance banning "for sale" and "sold" signs should be upheld.

Respectfully submitted,

MYRON H. GOTTLIEB,
KESSLER, TUTEK AND
GOTTLIEB,
325 Farnsworth Avenue
Bordentown, New Jersey 08505
Counsel for Respondents

EXHIBIT A

Willingboro Public Schools
Elementary and Secondary School Enrollment Survey
October 1970-1976

School		Minority 71	72	73	74	75	76	Total 71	72	73	74	75	76
Bookbinder	N	184	268	245	232	306	266	835	848	820	699	698	621
	%	22.0	31.6	29.9	33.2	43.8	42.8						
C.C.Ridge	N	86	84	111	100	124	141	687	635	579	497	486	442
	%	12.5	13.2	19.2	20.1	25.5	31.9						
Garfield	N	65	95	115	117	130	158	737	704	725	648	595	504
	%	8.8	13.5	15.9	18.1	21.8	31.3						
G. East	N	90	120	157	169	163	172	947	944	922	857	783	715
	%	9.5	12.7	17.0	19.7	20.8	24.1						
Hawthorne	N	191	176	198	230	250	258	896	832	778	731	673	602
	%	21.3	21.2	25.4	31.5	37.1	42.9						
King	N	118	148	141	168	178	166	805	838	754	776	768	688
	%	14.7	17.7	18.7	21.6	23.2	24.1						
Millbrook	N	170	206	253	228	247	244	822	744	724	687	646	607
	%	20.7	27.7	34.9	33.2	38.2	40.2						
Pennypacker	N	281	303	320	366	338	352	1009	912	839	783	690	642
	%	27.8	33.2	38.1	46.7	49.0	54.8						
Stuart	N	166	189	175	219	210	241	822	708	733	695	649	638
	%	20.2	26.7	23.9	31.5	32.4	37.8						
Twin Hills	N	169	170	184	206	198	202	858	757	735	703	682	625
	%	19.7	22.5	25.0	29.3	29.0	32.3						
Elementary Total	N	1520	1759	1899	2035	2144	2200	8418	7922	7609	7076	6670	6084
	%	18.1	22.2	25.0	28.8	32.1	36.2						
A.Levitt JR. H.S.	N	311	303	388	392	517	546	1550	1548	1545	1466	1422	1347
	%	20.1	19,6	25.1	26.7	36.4	40.5						
Memorial JR. H.S.	N	313	326	464	603	619	656	1942	2063	2016	2034	2003	2006
	%	16.1	15.8	23.0	29.6	30.9	32.7						
J.F.Kennedy SR. H.S.	N	495	714	852	572	432	468	2713	2981	3062	2051	1502	1472
	%	18.2	24.0	27.8	27.9	28.8	31.8						
WHS SR. H.S.	N				318	560	559				934	1574	1623
	%				33.5	35.6	34.4						
Secondary Totals	N	1119	1343	1704	1885	2128	2229	6205	6592	6623	6485	6501	6448
	%	18.0	20.4	25.7	29.1	32.7	34.6						
Grand	N	2639	3102	3603	3920	4272	4429	14623	14514	14232	13561	13171	12532
	%	18.0	21.4	25.3	28.9	32.4	35.3						

EXHIBIT "A"

Supreme Court, U. S.
FILED
JAN 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-357

LINMARK ASSOCIATES, INC. and WILLIAM MELLMAN,

Petitioners,

—v.—

THE TOWNSHIP OF WILLINGBORO and GERALD DALY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[redacted]E AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY [redacted] BRIEF *AMICI CURIAE*

JOEL M. GORA
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

STEPHEN M. NAGLER
American Civil Liberties
Union of New Jersey
45 Academy Street
Newark, New Jersey 07102

Attorneys for Amici Curiae

Table of Contents

	Page
Table of Authorities	ii
Motion for Leave to File Brief Amici Curiae	v
Brief for Amici Curiae	1
Interest of Amici	1
Statement of the Case	2
Summary of Argument	6
Argument	9
A. The kind of commercial speech prohibited here now enjoys substantial First Amendment protection.	9
B. The ordinance has not been shown to advance significant governmental interests in ways sufficient to justify the restrictions on First Amendment activity.	15
(1) The sign prohibition at issue is not merely a "time, place, and manner" regulation.	18
(2) The sign prohibition cannot be justified on the basis of the contents of the signs.	19

(3) The record does not support the purported need for the ordinance. 22

Conclusion 30

Table of Authorities

Barrick Realty, Inc. v. City of Gary, 354 F.Supp. 126 (N.D. Ind. 1973), aff'd, 491 F.2d 161 (7th Cir. 1974) 24, 25, 27

Bigelow v. Virginia, 421 U.S. 809 (1975) 10, 16

Brandenburg v. Ohio, 395 U.S. 444 (1969) 20

Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659 (1976) 19

Cameron v. Johnson, 390 U.S. 611 (1968) 18

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 20

Cox v. Louisiana, 379 U.S. 536 (1964) 18

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 20

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 20

Gooding v. Wilson, 405 U.S. 518 (1972).. 20

Grayned v. City of Rockford, 408 U.S. 104 (1972) 18, 19

Kleindienst v. Mandel, 408 U.S. 753 (1972) 12

Kovacs v. Cooper, 336 U.S. 77 (1949) ... 18

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 21

Miller v. California, 413 U.S. 15 (1973) 20

Mills v. Alabama, 384 U.S. 214 (1966)... 15

NAACP v. Button, 371 U.S. 415 (1963).... 15

Nebraska Press Ass'n. v. Stuart, ___ U.S. ___, 49 L.Ed.2d 683 (1976)... 15

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) 20, 27

Shelton v. Tucker, 364 U.S. 479 (1960)..16

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 16, 21

United States v. Mitchell, 327 F.Supp. 476 (N.D. Ga. 1971) 27

Valentine v. Chrestensen,
316 U.S. 52 (1942) 10

Virginia State Board of Pharmacy v.
Virginia Citizens Consumer Council,
___ U.S. ___, 48 L.Ed.2d 346
(1976) ..... passim

Young v. American Mini-Theater,
49 L.Ed.2d 310 (1976) 20

United States Constitution

First Amendment ..... passim

Statutes

42 U.S.C. Section 3604(e) 28

Other

Emerson, The System of Freedom of
Expression (1970) 22

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-357

LINMARK ASSOCIATES, INC.
and WILLIAM MELLMAN,

Petitioners,

v.

THE TOWNSHIP OF WILLINGBORO
and GERALD DALY,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Civil Liberties Union and the American Civil Liberties Union of New Jersey respectfully move, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amici curiae. Counsel for both the petitioners and the respondents have consented to the filing of this brief.*/ In

*/ Copies of the letters of consent are being filed with the Clerk.

addition, both counsel consented to this brief's being filed at least one week after December 23, the date on which the petitioners' brief was due. Because of the holiday season, however, this brief could not be prepared, produced and filed within the time required. Accordingly, although consents to the filing have been granted, this motion is required by the Rules.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members. The American Civil Liberties Union of New Jersey is the statewide affiliate. The ACLU is dedicated solely to defending the safeguards of the Bill of Rights. Central among those protections is the First Amendment's freedom of speech, a prerequisite to the continued maintenance of a free society. No less important, however, is the vindication of equal rights for all members of our society, including the right to equal access to public and private housing.

In previous cases the ACLU has represented before this Court both sets of interests contending for recognition in this case. We represented the appellant in Bigelow v. Virginia, 421 U.S. 809 (1975), contending that speech could not be labeled "commercial" and ipso facto stripped of all First Amendment protection, and we are currently representing the appellants in Bates v. State Bar of Arizona, No. 76-316, arguing that restrictions on advertising by attorneys violate the First

Amendment. On the other hand, we have pressed before the Court the rights of minority group members to fair and equal access to housing opportunities. See Hills v. Gautreaux, ___ U.S. ___, 47 L.Ed.2d 792 (1976). Indeed, while the ACLU opposes blanket restrictions of First Amendment rights even where "commercial" speech is concerned, it also supports laws aimed against blockbusting and fear-provoking real estate practices.

In this case, restrictions on First Amendment activity are sought to be justified ostensibly to aid in preserving the worthwhile goal of integrated housing in a community. But, as in so many other areas, our experience has been that restrictions on speech and expression are an impermissible method to achieve societal goals - even laudible ones. While it may arguably be valid to impose certain narrow restrictions on speech in order to facilitate fair housing, by discouraging the misrepresentation associated with blockbusting practices, the record in this case does not demonstrate such narrowly focused regulation. Instead, the prohibitions on speech are justified by vague fears of reactions of members in the community to the presence of "For Sale" or "Sold" signs on residential property. Such vague fears cannot justify the suppression of information, commercial or not. Our constitutional system - which includes both freedom of speech and equality of opportunity - is better served by the free flow of lawful, truthful informa-

tion, with any negative effects of such information countered by community educational efforts. As in so many other areas, we submit that the constitutionally proper response to "bad" speech, or to the supposed "bad" effects of neutral speech, is more speech.

It is to present this analysis that amici respectfully move for leave to file this brief.

Respectfully submitted,

JOEL M. GORA
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorney for Amici
Curiae

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-357

LINMARK ASSOCIATES, INC.
and WILLIAM MELLMAN,

Petitioners,

v.

THE TOWNSHIP OF WILLINGBORO
and GERALD DALY,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
AND THE AMERICAN CIVIL LIBERTIES UNION OF
NEW JERSEY, AMICI CURIAE

Interest of Amici

The interest of amici appears from the foregoing motion.

Statement of the Case

This case involves the constitutionality of a Willingboro, New Jersey local ordinance which has the effect of prohibiting individual homeowners and realtors from placing "For Sale" or "Sold" signs on private residential property. The ordinance has not been defended on aesthetic or other grounds unrelated to the content of the communication. Nor is there any evidence that such signs were untruthful or contained misrepresentations, or that they were used as part of any unlawful practice of "blockbusting," or other effort by realtors to discriminate on racial grounds in the sale of homes. The case thus squarely raises the issue of whether, and under what circumstances, the state may prohibit the communication of truthful, lawful information regarding a proposed or consumated commercial transaction.

The record is, at best, opaque and ambivalent.

The first major aspect of the record consists of the transcript of public hearings held by the township council to consider the proposed ban on "For Sale" and "Sold" signs. A parade of speakers - homeowners, realtors, local officials and other citizens - gave their views of the proposal and the problems it was intended to deal with. Essentially three themes were sounded: (1) that Willingboro was a relatively transient community for

factors and reasons wholly apart from racial considerations; (2) that there is a relatively high amount of real estate activity in the community, accompanied by fairly aggressive practices, but with no evidence of any blockbusting tactics or improper appeals by realtors to racial fears or prejudices; and (3) that in the period from 1970 to 1973, just prior to the consideration and passage of the ordinance, the non-white population increased from approximately 12 per cent of the community to 18 per cent. At the public hearings concern was expressed that the effect of a "forest of signs" was to create the impression of a "high turnover" in the neighborhood and a resulting "bad" image of the community. (App. 44a, 77a, 79a, 90a).1/

At the District Court hearing, however, there was a shift in emphasis in the reasons given for enacting the ordinance. Citizen concern with vague feelings of image was replaced by more specific testimony of a concern for preserving racial stability in

---

1/ "App. ___" refers to the Joint Appendix. The actual statistics indicated that, before passage of the challenged ordinance, there were approximately 200 signs on lawns of the approximately 11,000 homes in the community. (App. 37a).

the community and stabilizing the community at a magical "80/20" ratio. (App. 160a, 170a, 181a-182a). And the primary rationale advanced for the ordinance was to prevent "panic" selling by white families reacting to the presence of signs on their block and the resulting concern that the neighborhood would change with an influx of black families. (App. 181a, 244a). In this view, the ordinance was designed to prevent a "bad" "emotional" reaction by homeowners and to nip panic selling in the bud, by eliminating the signs which "tended to induce people" to place their homes on the market. (App. 206a-207a, 240a).

The ambivalent nature of the record is reflected by the sharply differing reaction of the four judges below who studied it. Two judges found that the motive for the ordinance was a benevolent attempt to preserve racial harmony, integration and stability in the community by preventing incipient panic selling by fearful white families overreacting to the presence of signs on residential property. These judges drew support for their assessment of community motives from the fact that the ordinance was supported by the township Human Relations Commission. The two other judges - District Judge Fisher and Circuit Judge Gibbons - found the motives and purposes quite the opposite. To them, the motives behind the ordinance were in fact malevolent and unconstitutional, namely, to facilitate the preservation of a residential

racial quota of approximately 80 per cent white families and 20 per cent black families by preventing non-white families from having access to information about the availability of housing.

All would appear to agree that the purpose of restricting the flow of information about the availability of homes for sale was to slow the process of white families moving out and black families moving in. The factual dispute is whether the motive for bringing about this effect was good (i.e., to preserve an integrated community) or bad (i.e., to impose racial "stabilization" and quotas). We submit that resolution of this dispute is largely irrelevant to resolution of the controversy. First, even assuming that the motive was benevolent, the community has sought to achieve purportedly benevolent purposes in a manner and under circumstances which violate the First Amendment. More importantly, where there is such a deep dispute over whether the purpose of a restriction on the free flow of information is good or bad, the instinct of the First Amendment and its preference for the free market place of ideas must prevail. Where it cannot with relative confidence be determined whether or not suppressing the flow of information is intended to achieve valid societal goals, the First Amendment resolves the conflict for us, as it did in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, ___ U.S. ___, 48 L.Ed.2d 346 (1976):

> It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. 48 L.Ed.2d at 363.

SUMMARY OF ARGUMENT

This Court's decision in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra, makes it clear that the kind of commercial speech which was prohibited here is entitled to substantial protection under the First Amendment. And the protected interests in commercial information about the availability of private housing involve the rights of sellers and consumers equally. A restriction on such information infringes First Amendment rights and cannot be sustained simply because there might be alternative sources of the same information.

This case does not require the Court to determine the extent to which a variety of First Amendment rules and doctrines might be applicable to judge the validity of restrictions on commercial information. It is sufficient, based upon the Virginia State Board of Pharmacy decision, for the Court to rule that there is a substantial burden of justification on the government to demonstrate that the challenged restriction necessarily advances important societal interests suffi-

cient to overcome speech interests. The court below, however, failed to employ such an analysis and improperly placed the burden of persuasion on the plaintiffs.

The justifications offered by the government do not meet its burden of sustaining the validity of the challenged ordinance.

First, the ordinance cannot be upheld as mere regulation of the "time, place and manner" of expression, for it is content which is controlled.

Second, the ordinance cannot be sustained as a valid regulation of the content of speech. This Court has permitted regulation of speech because of its content in only a very few, limited kinds of situations. The kind of content control sought to be exercised here does not fit within any of those categories and cannot be justified by a generalized fear of the reaction of members of the community to seeing such signs on front lawns.

Finally, even assuming arguendo that controls on such signs could ever be employed as part of a systematic effort to avert blockbusting, panic selling and housing segregation, the record here fails to demonstrate anything approaching such serious circumstances or requiring the prohibition which was imposed. A generalized concern that the presence of "For Sale" signs

might have an impact on attitudes which might be translated into changing racial housing patterns is a grossly inadequate basis for prohibiting the communication of truthful information about lawful transactions. Rather than suppressing such information, because of the feared effect it might have, the municipality was constitutionally required to choose the alternative of community education, dialogue and consensus to deal with the problem.

ARGUMENT

WILLINGBORO'S PROHIBITION ON THE PLACEMENT OF "FOR SALE" AND "SOLD" SIGNS ON RESIDENTIAL PROPERTY IS AN INFRINGEMENT ON SPEECH PROTECTED BY THE FIRST AMENDMENT AND IS NOT JUSTIFIED BY THE RATIONALES OFFERED TO SUSTAIN THE PROHIBITION.

The court below, ruling without the benefit of this Court's decision in the Virginia State Board of Pharmacy case, took an extremely restricted view of the First Amendment protection to be afforded to "purely commercial speech" and concluded that such protection could be withdrawn as a result of "balancing the governmental interest involved against the precise limitation imposed." 535 F.2d at 796. The court then balanced the various factors and concluded that the restriction was justifiable. Amici submit that both the standard employed and the analysis engaged in were inadequate and that the decision below cannot stand.

A. The kind of commercial speech prohibited here now enjoys substantial First Amendment protection.

"For Sale" and "Sold" signs convey a simple commercial message. They are proposals to engage in economic activity and statements that such activity has occurred. While such a commercial purpose and content

once was thought to put such speech beyond the protection of the First Amendment, see Valentine v. Chrestensen, 316 U.S. 52 (1942), it is now established beyond argument that "commercial" speech enjoys substantial First Amendment protection. Bigelow v. Commonwealth of Virginia, 421 U.S. 809 (1975), Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, supra. Indeed, Virginia State Board of Pharmacy makes it clear that any perjorative reference to "purely" commercial speech cannot substitute for an analysis of the issues involved, for what could be more "purely" commercial than information about the price of drugs. If normal First Amendment analysis applies to the sale of drugs, then surely it applies to the sale of a residential home.2/

2/ One of the reasons why the Court abjured reliance on a wooden categorical distinction between "purely" commercial speech and speech with ideational content was the ease with which non-commercial content could be supplied:

> Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not. 48 L.Ed. 2d at 360.

(continued)

The doctrinal effect of these cases is to shift the inquiry away from the categorical nature of the speech and toward an analysis of the nature and purpose of the restriction on that speech. In short, commercial speech is presumptively entitled to substantial First Amendment protection, with the extent and nature of that protection turning on the nature and effect of the restriction.

Here, too, one could hypothesize slight changes in content which would surely take a sign out of the category of "purely" commercial, for example, "For Sale To Any Family" or "Sold Without Discrimination." The content of such altered messages would surely be constitutionally immune from automatic prohibition, because of the implicit political statement being made.

Ironically, it is the supportors of the ordinance themselves who conceived of the signs as communicating more than a "purely" commercial message. They were concerned about the "invisible" message that the aggregate of signs would convey, namely, that the community was "changing," and that people were selling their homes for whatever reason. Indeed, it was precisely that rather non-commercial message that the ordinance, whether for good or bad reasons, was designed to interdict. In effect, purely commercial speech has been banned because of the non-commercial message it was feared that speech would convey.

The First Amendment interest in commercial speech which this Court has now recognized stems from the central role of economic information in our society. In the housing field, just as in pharmacy and other commercial activities, it is central to the functioning of the economic and social system that information "as to who is producing and selling what product, for what reason, and at what price" be easily disseminated. Virginia State Board of Pharmacy, 48 L.Ed.2d at 360.

Moreover, the First Amendment right runs not just to those who wish to convey the message - in the instant case, the homeowner or realtors - but also to the consumers who will hear or see the message and make the ultimate economic decisions. Virginia State Board of Pharmacy, supra; Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972). Significantly, the District Court here found that with the banning of signs the consumers would be limited in their informational options and be forced to rely inordinately on the services and judgments of real estate agents in seeking housing. The result would be a serious potential censorship of information by the intermediaries - the realtors - "who may be very selective in choosing which home...[they wish] to show a potential buyer." (App. 9a). In Virginia State Board of Pharmacy the Court was similarly concerned with the censorship effect of denying to consumers basic price information about something as important as medication. This Court found that informa-

tion of that kind was surely as important to the average person as political information: "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." 48 L.Ed.2d at 359. So too here, for what could be of more fundamental interest to the potential homeowner than driving down a residential street and seeing that a particular home which strikes his or her fancy is for sale.

Nor does the existence of methods other than house signs to advertise homes for sale - such as realty companies and newspapers - diminsh the substantial nature of the infringment on First Amendment rights. A limitation to such alternatives discriminates against homeowners who might wish to sell without resort to the services (and concommitant commission) of a realtor or who, for financial or other reasons, do not wish to purchase commercial advertising in news media.3/

3/ It should be noted that this sign ban affects not only those persons who sell property for a living, but also the individual homeowner who may be selling or buying a home for a variety of personal reasons far removed from profit. Thus, to characterize this ban as a regulation of "business" would ignore the central role the family home plays in each citizen's life.

Moreover, this Court has noted that such alternatives do not lessen the infringement on the First Amendment rights of the recipients of the message:

> We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means. Nor have we recognized any such limitation on the independant rights of the listener to receive the information sought to be communicated. Virginia State Board of Pharmacy, supra, 48 L.Ed.2d at 356, n. 15.

Finally, of course, if one credits the District Court's reading of the record, the ban on signs not only denies basic information to the prospective consumer, thereby increasing reliance on the realtor, but it also facilitates the possibility of illegal, racially discriminatory practices by realtors because it reposes in them total control over information about who is buying and who is selling.

Given its narrow view of the protection available to the speech at issue here, the court below failed to analyze these issues with the requisite care. In Virginia State Board of Pharmacy, the Court framed the issue and stated its conclusion as follows:

> What is at issue is whether a state may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative. 48 L.Ed.2d at 365 (footnote omitted).

We submit that the issue here is precisely the same, and, for the following reasons, the Court should reach the same conclusion.

B. The ordinance has not been shown to advance significant governmental interests in ways sufficient to justify the restrictions on First Amendment activity.

Under normal rules for analyzing prohibitions or restrictions on the communication of truthful and otherwise lawful information, any such bans are presumptively unconstitutional, see, e.g., Nebraska Press Ass'n. v. Stuart, ___ U.S. ___, 49 L.Ed.2d 683 (1976), some prohibitions cannot be justified at all, see Mills v. Alabama, 384 U.S. 214 (1966), the state normally carries a heavy burden of justification that the restraint or prohibition is necessary to further a compelling state interest, NAACP v. Button, 371 U.S. 415, 438-49 (1963), the

state must show that the restriction on speech is drawn as narrowly as possible and that no less restrictive means of regulation will achieve the state's goals with equal facility, Shelton v. Tucker, 364 U.S. 479, 488-90 (1960), and, finally, "...in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508 (1969).

But the Court need not decide whether those rules are fully applicable in assessing the validity of restrictions on the communication of commercial information. Nor, indeed, do the amici suggest that all such rules must be employed. With the Court, we agree that the First Amendment protection to be afforded to commercial speech does not require that all First Amendment doctrines and rules be fully operative. Restrictions may be permissible on commercial speech which if imposed on political speech would be intolerable - for example, regulation to prevent fraud and misrepresentation, even including prior restraints on objectively false commercial information; restrictions on advertising when public health and safety necessitate.

The Court need not reach such questions because it is clear from Bigelow v. Virginia, supra, and particularly from Virginia State Board of Pharmacy, supra, that, even where a

restriction on commercial information is involved, the government must meet a substantial burden of demonstration that the restriction closely, precisely, and necessarily advances an important societal interest sufficient to overcome the speech interest. It is our submission that no such showing has been made here, particularly since, as in Virginia State Board of Pharmacy, the justification for the ordinance is based upon "...the reactions it is assumed people will have to the free flow of... information." 48 L.Ed.2d at 362-63.

As a consequence of its assumption that commercial speech remained essentially unprotected or only marginally protected under the First Amendment, the Court of Appeals, however, failed to engage in such an analysis. Instead, that court placed the burden on plaintiffs to prove the unreasonableness of the ordinance, cloaked the enactment in a presumption of validity, and demanded that the plaintiffs "establish, at least prima facie, that the ordinance is so unreasonable and arbitrary as to amount to an impermissible infringment on constitutional guarantees." 535 F.2d at 793. Under Virginia State Board of Pharmacy, that approach was improper, and the burden of justification must rest with the government. For the following reasons, that burden cannot be met.

(1) The sign prohibition at issue is not merely a "time, place, and manner" regulation.

The conclusion below that the ordinance was a permissible "manner and place limitation" on speech misperceives the meaning and proper application of the "time, place and manner" controls permitted under this Court's cases. Banning all "For Sale" and "Sold" signs is, instead, an impermissible restriction on the content of speech.

Although the Court in Virginia State Board of Pharmacy, supra, cited "time, manner, and place" regulations as one permissible control on otherwise protected commercial speech, the Court identified the limited nature of such regulations, 48 L.Ed.2d at 363-64, and the Court's precedents allowing such restrictions make clear that the Willingboro sign ordinance does not fit into this category. See Cox v. Louisiana, 379 U.S. 536, 554-555 (1964)(demonstration); Cameron v. Johnson, 390 U.S. 611 (1968)(courthouse picketing); Grayned v. City of Rockford, 408 U.S. 104 (1972)(anti-noise ordinance); Kovacs v. Cooper, 336 U.S. 77 (1949)(sound trucks). In each of these cases the Court has recognized the need for practical and necessary traffic and noise controls on the manner of exercising freedom of speech. But the controls must relate to actual, specific, and immediate circumstances, such as the need for public order, traffic control or

the continuation of public functions. There is no claim here that "For Sale" signs create immediate public disorders, or cause traffic disruptions.

More significantly, however, in none of those cases has the Court upheld restrictions based on the content of the speech. Sound and traffic controls apply evenhandedly to those espousing all points of view, not just one. On the other hand, "Clearly the government has no power to restrict such activity because of its message." Grayned v. City of Rockford, supra, 408 U.S. at 115. The anti-sign ordinance in issue here, however, bans certain signs specifically because of the message they carry. Front yard posters advertising church bazaars or supporting a political candidate are not forbidden; "For Sale" signs are. The ordinance does not prohibit these signs because of the manner in which they are displayed, or the time of the day when they may be viewed, or their placement on the street; it prohibits the signs because of what they say. Whatever else may be said of this restriction, it cannot be justified under the "time, place and manner" doctrine. See Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 687 (1976).

(2) The sign prohibition cannot be justified on the basis of the contents of the signs.

In a very few, limited kinds of circum-

stances the Court has permitted regulation of speech based upon its content. The Court has allowed or accepted limited control of obscene materials, Miller v. California, 413 U.S. 15 (1973), of advocacy of imminent lawless action likely to incite such action, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), of "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942), cf. Gooding v. Wilson, 405 U.S. 518 (1972), of defamatory speech uttered with "actual malice," Gertz v. Robert Welsh, Inc., 418 U.S. 323, 340 (1974), and of advertisements proposing illegal activities. Cf., Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations, 413 U.S. 376 (1973).4/

4/ The Court in Young v. American Mini-Theater, 49 L.Ed.2d 310, 325 (1976), suggested that "the measure of constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication." The examples given in Young and also in Virginia State Board of Pharmacy, however, clearly indicate that the content of a "For Sale" sign does not justify its prohibition. Such a sign does not convey deceptive, misleading or false information. Virginia State Board of Pharmacy, 48 L.Ed.2d at 364-65. There is no claim here, nor could there be, that the information is false; these statements are true in all respects, which is a critical distinction. Cf. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). Nor does a "For Sale" sign (continued)

But nowhere has the Court permitted controls on the content of non-obscene, truthful, lawful speech simply because the speech may provoke fear in the listeners or viewers, causing them to take political or personal action, or because the speech aroused "undifferentiated fear or apprehension of disturbance," Tinker v. Des Moines Community School District, 393 U.S. 503, 508 (1969), in the minds of government authorities. If "For Sale" signs may be prohibited to dissuade citizens from moving from a community, how much more effective it would be to censor disturbing reports of crime, taxes, pollution, and educational difficulties. But that was not the choice made by the First Amendment. It is beyond dispute that free speech may not be constrained for the purpose of preserving "community stability."

---

advertise illegal activities. 48 L.Ed.2d at 365. Finally, the Young Court's citation of Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), is inappropriate to the issues here. There a city was permitted discretion in what advertisements it would allow on city transit vehicles. The Court held that such vehicles were not a First Amendment forum. But "public thoroughfares" are free speech forums, 418 U.S. at 303, and Willingboro has restricted speech on private property adjacent to a public thoroughfare.

> "The principle is plain that there can be no interference with freedom of expression on the general ground that it will lead to social change, or change at the wrong rate, or in the wrong direction." Emerson, The System of Freedom of Expression, (1970), 47.

Thus, neither the Court's cases on regulation of the content of speech nor its suggestions that there might be deviations from such rules where commercial speech is concerned justify the prohibition on content sought to be achieved here.

(3) The record does not support the purported need for the ordinance.

Even assuming arguendo that controls on "For Sale" and "Sold" signs could, in certain circumstances, be employed as part of a systematic effort to avert blockbusting, panic selling, and housing segregation, Willingboro's ordinance must still fall because the record here fails to demonstrate any such serious circumstances requiring such a prohibition.

The District Court found that the purpose of the sign ordinance was "to promote a racial balance or more properly, a racial imbalance, in order to perpetuate existing racial lines" and to freeze in "past discrimination, denying blacks a fair opportunity to find suitable housing." (App. 8a). The Circuit Court rejected that finding and then, with a nice bit of semantic line-drawing, held that the purpose was to "stabilize" the community, to diminish "the number of neighbors leaving on the basis of fear alone," 535 F.2d at 797, and to "nip panic-selling in the bud," Id. at 798. The respondents claim that the purpose was to prevent the metamorphosis of Willingboro "from an integrated community to a ghetto." Brief in Opposition, p. 8.

Significantly, although the record does show an increasing non-white population in Willingboro (from 12 per cent to 18 per cent from 1970 to 1973; from 0.5 per cent to 12 per cent from 1960 to 1970) (App. 128a), this increase occurred "without the formation of a racially segregated area or 'ghetto'." 535 F.2d at 789. There was, as the District Court found, no evidence of massive "white flight," no evidence of blockbusting or fear-provoking real estate tactics, and no evidence of declining property values. There was merely the concern that the existence of "For Sale" signs would create a "fear psychology" in the community, a fear that a large turnover in home-ownership "was resulting in a substantial influx of minority groups ...beyond what could be sustained without the community itself turning into a ghetto within the county." (Testimony of Mayor W.

J. Kearns, App. 181a.)[5/]

On this record, a municipality may not control the content of protected commercial speech in the name of "community stability" or in order to assauge the inchoate fears of the citizenry.

The only other reported case upholding a similar ban on real estate signs, Barrick Realty, Inc. v. City of Gary, 354 F.Supp. 126 (N.D. Ind. 1973), aff'd, 491 F.2d 161 (7th Cir. 1974), is not to the contrary. That case dealt with one part of the governmental response to Gary, Indiana's "inner-city" crisis. The record showed:

> ...first, widespread conditions of segregated housing; and second, the social and economic breakdown which accompanies rapid racial transformation of an entire neighborhood or area of the city. Directly related to both these problems is the mass flight of white residents from transitional areas of the city. To illustrate, population statistics show that between the years 1960 to 1970, the white population of Gary decreased by 24.9 percent while the non-white population increased by 34.9 percent. This rapid population turnover is caused in large part by the phenomenon of "panic selling." The immediate objective of the ordinance in question is to bring this massive population shift under control by reducing the rate of panic selling in Gary.
> 354 F.Supp. at 134.

5/ Assuming that panic selling was already occurring in Willingboro - a fact not established by the record - there was no evidence that the sales would be to minority group members only and no evidence that the turnover in home-ownership would result in the transformation of Willingboro into a ghetto.

The record also showed that some real estate brokers who placed these signs "...actively encouraged resegregation by unlawfully urging whites to sell quickly before they had black neighbors and lower property values." 491 F.2d at 164.

The situation in Willingboro is strikingly different. Gary is an urban city in the center of a concentrated industrial area, Willingboro is a New Jersey suburb. Instead of suffering from "widespread segregated housing," Willingboro has avoided "the formation of a racially segregated area or 'ghetto'." 535 F.2d at 789. While the non-white population in Willingboro increased, the total white population also increased significantly from 1960 to 1970, and dropped

only slightly (by under 2,000) from 1970 to 1973 (App. 128a). The record, moreover, gives no evidence of blockbusting by real estate brokers, no evidence of declining property or social values,[6] and no evidence of panic selling or abnormally high home turnover rates.

The record here demonstrates only the fear that sizeable numbers of white families might begin moving out of Willingboro, that they might be replaced by black families, that the presence of "For Sale" signs might encourage this trend and might lead to panic-selling. Without showing more than this generalized concern over an incipient problem, Willingboro cannot be said to have demonstrated a substantial municipal interest in prohibiting "For Sale" signs. If, faced with a state's "strong interest in maintaining" the professionalism of pharmacists, the Court nevertheless upheld the First Amendment right to advertise drug prices, Virginia State Board of Pharmacy, 48 L.Ed.2d at 361, then surely faced with only generalized, predictive fears of population shifts, this Court should not

---

6/ Some citizens apparently thought the property values, though increasing, were not rising as quickly as elsewhere. 535 F.2d at 809.

permit a blanket prohibition of "For Sale" signs. The same interests in the free flow of commercial information exist here as in Virginia State Board of Pharmacy. Since significant contrary interests have not been shown to exist, First Amendment rights should enjoy continuing protection.

Accordingly, under the facts of this case, the Court need not consider whether a similar sign control would be permissible in circumstances where "white flight" is an urgent reality and where the sign ordinance is part of a governmental scheme to control conduct, such as patterns and practices of blockbusting. See Barrick Realty, Inc., supra; see also, United States v. Mitchell, 327 F.Supp. 476 (N.D. Ga. 1971). Your amici support anti-blockbusting statutes which prohibit false or deceptive statements concerning changes in the racial, religious or national origin character of a neighborhood, and/or the effect of those changes, made with the intent for commercial gain, to promote the sale of property. Cf. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, supra.

We have serious doubts, however, about the validity of the Barrick decision to the extent that it upholds a ban on communicating truthful information about lawful transactions. But whatever the resolution of that issue would be in that context, the record here does not require the Court to resolve such issues.

Similarly, a decision invalidating the ordinance here on the record here would not necessarily call in to question federal and

state anti-blockbusting provisions, such as 42 U.S.C. Section 3604(e), which courts have found to be constitutional as construed to regulate the conduct of inducing a person to sell his home by making certain representations. See United States v. Mitchell, supra, 327 F.Supp. at 486. In the instant case, however, the township Council did not so limit its sign ban; indeed, the record shows virtually no apprehension at all of the problem of blockbusting in Willingboro.

Instead, Willingboro chose to achieve social goals well short of preventing blockbusting, and did so through the mechanism of censorship. Assuming that Willingboro may constitutionally seek what the Circuit Court called "community stability," clearly more, rather than less, speech is the means prescribed by our constitution for achieving that goal. The Circuit Court noted that the sign issue occasioned "two years of public ferment," 535 F.2d at 791, that the township Council "investigated...consulted...[and] held two public meetings..." before it acted. 535 F.2d at 799. Under the First Amendment, those efforts should rather have been directed toward an effort to allay the incipient fears of the community, to spread before them the facts - that there was no blockbusting, no massive influx of minorities, no precipitent decline in property values - and to seek community stability through understanding and concensus. The choice was between seeking

the community goal through disclosure and dialogue or through government-imposed citizen ignorance. What Willingboro chose was the alternative forbidden by the First Amendment. For what the Court said of the price of drugs is no less true of the sale of homes:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.... But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.... In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have re-enforced our view that it is. 48 L.Ed.2d at 363.

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectively submitted,

Joel M. Gora
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Stephen M. Nagler
American Civil Liberties
Union of New Jersey
45 Academy Street
Newark, New Jersey 07102

Attorneys for Amici Curiae */

January 1977

---

*/ Counsel wish to express their appreciation to Terry Thatcher, a third-year student at the Yale Law School, for his assistance in the preparation of this brief.

Supreme Court, U. S.
FILED
JAN 19 1977

Supreme Court of the United States

October Term, 1976
No. 76-357

LINMARK ASSOCIATES, INC. AND WILLIAM MELLMAN,
Petitioners,

vs.

THE TOWNSHIP OF WILLINGBORO AND GERALD DALY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE THE CITIES OF SHAKER HEIGHTS, OHIO, AND CLEVELAND HEIGHTS, OHIO

PAUL R. DONALDSON
Director of Law, City of Shaker Heights
3400 Lee Road
Shaker Heights, Ohio 44120
(216) 752-5000

DONALD K. BARCLAY
Director of Law, City of Cleveland Heights
2953 Mayfield Road
Cleveland Heights, Ohio 44118
(216) 321-0100
Attorneys for Amici Curiae

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

I. Interest of the Amici Curiae 1

II. Preliminary Remarks 3

III. Argument 4

1. The Prohibition of Real Estate Sale Signs in Residential Districts Is a Constitutionally Valid Exercise of Municipal Police Power 4

2. The Prohibition of Real Estate Sale Signs in Residential Districts of Shaker Heights and Cleveland Heights Has Strengthened Property Values and Has Been Widely Accepted by the Local Realty Community 5

3. The Prohibition of Real Estate Sale Signs in Residential Districts Is an Important Facet of Affirmative Action by Local Governments to Promote Community Integration 6

IV. Conclusion 9

TABLE OF AUTHORITIES

Cases

Barrick Realty v. City of Gary, 491 F.2d 161 (7th Cir. 1974) 9

Berenson v. Town of New Castle, 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975) 8

Heights Community Congress v. Rosenblatt Realty, No. D74-1059, P-H Equal Opp. In Housing at 14,473, ¶13,702 (U.S.D.C. N.D. Ohio 1975) 7

Metropolitan Housing Dev. Corp. v. City of Arlington Hts., 517 F.2d 409 (7th Cir. 1975), *app. pending*, 423 U.S. 1030 (1976) 8

Southern Burlington County NAACP v. Town of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1976) 8

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) 7-8

U. S. v. Mitchell, 335 F. Supp. 1004 (N.D. Ga. 1971) 8

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 5

Zuch v. Hussey, 366 F. Supp. 553 (E.D. Mich. 1975) 8

Texts

Alfred and Marcoux, *Impact of a Community Association on Integrated Suburban Housing Patterns*, 19 CLEVE. ST. L. REV. 90, 91-92 (1970) 6

Blank, *Ludlow—A Lesson in Integration*, READER'S DIGEST (Sept., 1968) 7

Marcoux, *Integrated Housing*, NATION'S CITIES (Oct., 1973) 7

N.Y. Times, Oct. 18, 1975, p. 1, *Integrated Housing Thrives in Suburb* 7

N.Y. Times, Aug. 13, 1972, *Integration: One Way to Avoid Busing* 7

R. ANDERSON, AMERICAN LAW OF ZONING 2d, §§7.16, 15.82, 15.83 (1976) 4

Supreme Court of the United States

October Term, 1976
No. 76-357

LINMARK ASSOCIATES, INC. AND WILLIAM MELLMAN,
Petitioners,

vs.

THE TOWNSHIP OF WILLINGBORO AND GERALD DALY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE THE CITIES OF SHAKER HEIGHTS, OHIO, AND CLEVELAND HEIGHTS, OHIO

I.

INTEREST OF THE AMICI CURIAE*

The cities of Shaker Heights and Cleveland Heights are chartered municipal corporations of the State of Ohio.

*No letters of consent from the Petitioners and Respondents to the filing of this brief have been obtained since, under Rule 42(4), *amici curiae* City of Shaker Heights and City of Cleveland Heights need not obtain such consent as political subdivisions of a State which are filing an *amicus curiae* brief sponsored by their authorized law officers.

Cleveland Heights is north of and adjacent to Shaker Heights, and both cities border upon the east side of the City of Cleveland. Both Shaker Heights and Cleveland Heights prohibit the posting of "for sale", "sold", and other signs relating to the sale of real estate in residential districts, by means of zoning provisions much like the challenged zoning ordinance of Respondent Township of Willingboro.

The interest of Shaker Heights and Cleveland Heights in this case is predicated upon the important concerns of public peace, safety, and welfare stemming from the prohibition of outdoor advertising in residential areas and from the stability in the integrated communities of Shaker Heights and Cleveland Heights engendered to a great degree by zoning provisions like the one at issue. Further, the prohibition of signs pertaining to the sale of realty in residential areas is a vital part of comprehensive programs in Shaker Heights and Cleveland Heights to foster stabilized housing integration by combatting the psychology of fear and the promotion of panic selling of homes spawned to a large degree by realty sale signs.

Amici curiae respectfully submit that this Court must uphold the decision below of the Third Circuit Court of Appeals, which found constitutional the Willingboro zoning ordinance at issue. A reversal of that decision would have the serious effect of eroding the police powers of all American municipalities over local zoning policy. A reversal would also strike a crippling blow to the significant, successful inroads that Shaker Heights and Cleveland Heights have made toward coping with rapid community racial change and in fostering truly integrated communities.

II.

PRELIMINARY REMARKS

The zoning ordinances prohibiting signs pertaining to the sale of realty in residential districts have existed in Shaker Heights since April, 1964, and in Cleveland Heights since December, 1967. The Shaker Heights provision was one of the first of its kind in the United States. These zoning provisions primarily stemmed from the disruption to community peace, safety, and welfare in the early 1960's which resulted from the unfounded, irrational fears of residents and the panic selling of homes due to the rapid influx of black families from the City of Cleveland into Shaker Heights and Cleveland Heights.

Prior to enacting zoning ordinances prohibiting residential real estate signs, both Shaker Heights and Cleveland Heights made careful studies of the situation presented by such signs. The realty sale signs were found to be aesthetically displeasing and a burdensome imposition of commercialism into residential areas. The signs were also found to be an effective "tool" for certain real estate brokers to use in applying pressure to homeowners to sell their homes in the face of artificial, fear-imposed, "eroding" property values—the sad phenomenon of "blockbusting". For instance, in the early 1960's on a certain street in Shaker Heights, the arrival of the first black family on the street was "greeted" by a dozen "for sale" signs out of a total of about fifty homes on the street. This scene was repeated on many other streets. Such a use of realty sale signs breeds a psychology of fear.

The realty sale signs were employed by certain real estate brokers and other individuals in Shaker Heights and Cleveland Heights without consideration of the effect the signs would have on the delicate process of neighborhood

integration. A feeling of negativity is bred by the sight of a neighborhood sprouting such signs. The negative feelings readily develop into panic among homeowners who don't want to leave the neighborhood, but are pressured into it by unscrupulous realtors and other individuals who have no concern for the welfare of the community, who point out the signs and force-feed white homeowners unfounded fears of eroding property values resulting from each new black family.

III.

ARGUMENT

1. The prohibition of real estate sale signs in residential districts is a constitutionally valid exercise of municipal police power.

Real estate sale signs are basically outdoor advertising. The zoning ordinances of local governments to regulate outdoor advertising have long been recognized as constitutional exercises of the local police power to advance public health, safety, morals, and welfare. See, e.g., R. ANDERSON, AMERICAN LAW OF ZONING 2d, §§7.16, 15.82, 15.83 (1976), and cases cited therein.

Both Shaker Heights and Cleveland Heights do not limit their outdoor advertising restrictions merely to realty sale signs. All forms of outdoor business advertising are prohibited in residential districts under the zoning codes of both cities.

Regulations which exclude signs from residential districts have been upheld as constitutionally valid protection of public interests, which interests have been found as more than local aesthetics. R. ANDERSON, *supra*, at §15.83. In this case, the primary public interests to be advanced

by the prohibition of real estate sale signs are the preservation of property values, and the promotion of stabilized community integration as well as the benefits to all which stem from living in a heterogenous racial environment—a hope to many in the United States, but very much a reality in Shaker Heights and Cleveland Heights.

An ordinance regulating the usage of signs such as the one in issue is a constitutional exercise of local police powers over zoning. Such an enactment is consistent with sound zoning practices regulating commercial invasions into residential peace and privacy. "The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

2. The prohibition of real estate sale signs in residential districts of Shaker Heights and Cleveland Heights has strengthened property values and has been widely accepted by the local realty community.

Petitioners Linmark Associates, Inc. and William Mellman argue that the only remedy a local government has to combat racially-motivated panic selling is by educating the citizenry, not by restricting outdoor realty advertising. Petitioners' Brief, at 17. It has been the experience of Shaker Heights and Cleveland Heights that much more than education is necessary to cure the effects of generations of segregation and discrimination. An extensive program of educating the community that racial fears were unfounded was attempted with only limited success in Shaker Heights before the City took the necessary step in 1964 of prohibiting "for sale" signs. See

Alfred and Marcoux, *Impact of a Community Association on Integrated Suburban Housing Patterns*, 19 CLEVE. ST. L. REV. 90, 91-92 (1970).

It is significant that for almost thirteen years in Shaker Heights, and for nine years in Cleveland Heights, no realtors or other persons have challenged the cities' realty sign prohibition ordinances. Initial opposition was voiced to the enactment of the zoning provisions, but it did not last for long. It has been the experience of both cities that realtors have come to embrace the prohibition, and have readily cooperated with it.

The prohibition of realty signs has been a major factor in promoting a meaningful process of community integration in Shaker Heights and Cleveland Heights while helping to reduce the flight of white families to other communities. The realty sign ordinances are not, however, tied into racial "steering". Shaker Heights nor Cleveland Heights do not prohibit or limit other means of listing homes for sale, such as by media advertisements, realtor listing pools, or any other means. The realty community has come to appreciate the value of the real estate sale sign prohibition, for it has greatly helped to strengthen the real estate market in Shaker Heights and Cleveland Heights by preserving and stabilizing property values.

3. The prohibition of real estate sale signs in residential districts is an important facet of affirmative action by local governments to promote community integration.

The prohibition of real estate sale signs in residential districts is one facet of ongoing, extensive programs in Shaker Heights and Cleveland Heights to induce real estate brokers to renew their dwindling efforts in the integrated communities; to effect increased demand by white

families for housing in integrated areas; to foster a closer working relationship between realtors and neighborhood associations; and, above all, to insure stabilized integration in Shaker Heights and Cleveland Heights.

Both cities have agencies to work toward achieving the above objectives, the Shaker Heights Housing Office and the Cleveland Heights Community Congress. The operations and success of these agencies are well documented. See, e.g., *Integrated Housing Thrives in Suburb*, N.Y. Times, Oct. 18, 1975, p. 1; *Heights Community Congress v. Rosenblatt Realty*, No. D74-1059, P-H Equal Opp. in Housing at 14,473, ¶13,702 (U.S.D.C. N.D. Ohio 1975); Blank, *Ludlow—A Lesson in Integration*, READER'S DIGEST, (Sept., 1968); Marcoux, *Integrated Housing*, NATION'S CITIES (Oct., 1973); *Integration: One Way to Avoid Busing*, N.Y. Times, Aug. 13, 1972. Other means taken by Shaker Heights and Cleveland Heights to effect stabilized integration are real estate review committees consisting of municipal officials, realtors, and members of the community, as well as ordinances prohibiting "blockbusting" and racial "steering".

The dissenting opinion of Circuit Judge Gibbons in the decision below (535 F.2d 786, 805-816) contends that the intended purpose of the Willingboro realty sign prohibition ordinance is one of discrimination against racial minorities. His analysis implies that governmental action to stabilize community integration is unconstitutional, because such stabilization activity somehow bars minorities from a community and thus creates a discriminatory impact.

However, ordinances such as the one in issue are intended to promote and stabilize integration, not defeat it. The goal of our national housing policy is to "replace the ghettos" with truly integrated and balanced living patterns for all races. *Trafficante v. Metropolitan Life Ins. Co.*,

409 U.S. 205 (1972). Proper provision for adequate housing of all races is absolutely essential in the promotion of the general welfare of a community. A municipality has an affirmative obligation to meet the needs and desires of all people who desire to live in a community. *Southern Burlington County NAACP v. Town of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1976); *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S. 2d 672, 341 N.E.2d 236 (1975). A municipality must take the responsibility of insuring that a segregated housing pattern does not develop in the community. See *Metropolitan Housing Dev. Corp. v. City of Arlington Hts.*, 517 F.2d 409 (7th Cir. 1975), *app. pending*, 423 U.S. 1030 (1976).

The real estate sale sign prohibition ordinances of Willingboro, Shaker Heights, and Cleveland Heights are primarily designed to counteract the evil effect upon a community promulgated by realtors through racial steering, blockbusting, and panic selling. See *Zuch v. Hussey*, 366 F. Supp. 553 (E.D. Mich. 1975). Such an ordinance prevents unscrupulous realtors and other individuals who have no concern for the welfare of the community from preying upon the fears of property owners in racially transitional areas and thereby inducing the kind of panic selling which results in community instability and decline. See *U. S. v. Mitchell*, 335 F. Supp. 1004 (N.D. Ga. 1971).

The promotion of orderly integration by the use of the zoning ordinance at issue may well be said to rise to the level of a compelling governmental interest, which supercedes any rights that realtors, independent home sellers, prospective home buyers, or any other individual may have relative to the posting of "for sale" or "sold" signs in front of homes. The Township of Willingboro and the cities of Shaker Heights and Cleveland Heights have acted to balance individual and collective interests to insure

open, integrated communities. The interest of black and white citizens in stable communities outweighs any minor inconvenience to personal interests. *Barrick Realty v. City of Gary*, 491 F.2d 161 (7th Cir. 1974).

IV.

CONCLUSION

We submit that much more than governmental restrictions upon commercial real estate marketing methods is at issue in this case. At stake are the entire police power of local governments over local zoning policy and the vital function of local governments to regulate and effect fair housing practices and stabilized integration in order to prevent "ghettoization" and ensuing community deterioration and blight. A reversal of the decision below would effectively curtail the power of a community over its development and destiny. Therefore, *amici curiae* City of Shaker Heights and City of Cleveland Heights respectfully request the Court to uphold the ordinance of the Township of Willingboro in issue and to affirm the decision below of the Third Circuit Court of Appeals.

Respectfully submitted,

PAUL R. DONALDSON
Director of Law, City of Shaker Heights

DONALD K. BARCLAY
Director of Law, City of Cleveland Heights

Attorneys for Amici Curiae

Supreme Court, U.S.
FILED
JAN 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-357

LINMARK ASSOCIATES, INC., et al.,

Petitioners,

vs.

THE TOWNSHIP OF WILLINGBORO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

JACK GREENBERG
CHARLES STEPHEN RALSTON
MELVYN R. LEVENTHAL
BILL LANN LEE
LINDA S. GREENE
BETH J. LIEF
10 Columbus Circle
Suite 2030
New York, New York 10019

Attorneys for Amicus Curiae

TABLE OF CONTENTS

PAGE

Interest of *Amicus Curiae* 1

ARGUMENT

Introduction 2

Summary of Argument 3

I. The Willingboro Ordinance Enforces the Fair Housing Guarantee of the Thirteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment 3

A. The National Fair Housing Guarantee 3

B. The Willingboro Ordinance 7

II. The Willingboro Ordinance Is an Appropriate Means of Thwarting Panic Selling to Preserve an Integrated Community And Does Not Offend the First Amendment 10

A. The Ban on "For Sale" and "Sold" Signs Is Closely Related to Illegal Discrimination in Housing 12

B. The Proliferation of "For Sale" and "Sold" Signs in a Racially Tense Community Broadcasts a Threatening and Deceptive Message 14

C. "For Sale" and "Sold" Signs Are Thrust Upon a Captive Audience 16

CONCLUSION 18

APPENDIX A—

State and Local Anti-Panic Selling Provisions 1a

Table of Authorities

Cases:

	PAGE
Barrick Realty, Inc. v. City of Gary, Indiana, 354 F. Supp. 126 (N.D. Ind.), *aff'd* 491 F.2d 161 (7th Cir. 1974)	5, 14
Bigelow v. Commonwealth of Virginia, 421 U.S. 809	10, 11, 12
Brandenburg v. Ohio, 395 U.S. 444 (1969)	11
Brown v. State Realty Co., 304 F. Supp. 1236 (N.D. Ga. 1969)	13
Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944)	15
Cohen v. California, 403 U.S. 15 (1969)	18
Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948)	14
E. F. Drew & Co. v. FTC, 235 F.2d 735 (2d Cir. 1956)	14
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1976)	16, 18
Head v. Board of Examiners, 374 U.S. 424 (1960)	14
Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946)	14
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)	6
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)	17
Levitt and Sons, Inc. v. Division Against Discrimination in State Department of Education, 31 N.J. 514, 158 A.2d 177, appeal dism., 363 U.S. 418 (1960)	7
Linmark Associates, Inc. v. Township of Willingboro, 535 F.2d 786 (3rd Cir. 1976)	1, 7, 8
Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248, appeal dism., 393 U.S. 316 (1969)	17
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)	15

	PAGE
National Commission on Egg Nutrition v. FTC, 517 F.2d 485 (7th Cir. 1975)	14
Packer Corp. v. Utah, 285 U.S. 105 (1932)	17
Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973)	10, 11, 13
Public Utilities Comm'n v. Pollack, 343 U.S. 451 (1952)	17
Railway Mail Assoc. v. Corsi, 326 U.S. 88 (1945)	9
Rockville Reminder, Inc. v. United States Postal Service, 480 F.2d 4 (4th Cir. 1973)	12
Rosenfeld v. New Jersey, 408 U.S. 901 (1972)	18
Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972)	5, 14
United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826 (1973)	12, 14
United States v. Hunter, 459 F.2d 205 (4th Cir.), cert. denied, 409 U.S. 934 (1972)	12, 13
United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969)	14
United States v. Mitchell, 335 F. Supp. 1004 (N.D. Ga. 1971)	4, 14
United States v. Re, 336 F.2d 306 (2d Cir), cert. denied, 370 U.S. 904 (1964)	15
Village of Arlington Heights v. Metropolitan Housing Development Corp., No. 75-616 (January 11, 1977)	7
Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, 425 U.S. 748 (1976)	10, 14
Williamson v. Lee Optical, 348 U.S. 483 (1958)	14
Young v. American Mini Theatres, —— U.S. ——, 49 L.Ed. 310 (1976)	11, 14
Zuch v. Hussey, 394 F. Supp. 1028 (E.D. Mich. 1975)	14

PAGE

Constitutional Provisions and Statutes:

First Amendment 3, 9, 10, 11, 12, 13
Fourteenth Amendment 3, 9
Thirteenth Amendment 3, 9
23 U.S.C. § 131 17
42 U.S.C. § 3601 1
42 U.S.C. § 3604 12
42 U.S.C. § 3604(c) 13
42 U.S.C. § 3604(e) 5, 12
42 U.S.C. § 3609 6
42 U.S.C. § 3610 6
42 U.S.C. § 3612 6
42 U.S.C. § 3615 6
42 U.S.C. § 3616 6

Other Authorities:

112 Cong. Rec. (1966) 5, 7
114 Cong. Rec. (1968) 5, 6
Hearings on S.1358, S.2114 and S.2280 Before the Subcomm. on Housing and Urban Affairs of the S.Comm. on Banking and Currency, 90th Cong. 1st Sess. (1967) 5
Note, Developments in the Law—Deceptive Advertising, 80 HARV. L. REV. 1005 (1970) 15
U.S. Commission on Civil Rights, Twenty Years After Brown: Equal Opportunity in Housing (1975) 1
U.S. Commission on Civil Rights, Equal Opportunity in Suburbia (1974) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-357

LINMARK ASSOCIATES, INC., et al.,
Petitioners,

vs.

THE TOWNSHIP OF WILLINGBORO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

Interest of *Amicus Curiae**

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist black persons to secure their constitutional rights by the prosecution of lawsuits. The Legal Defense Fund receives many requests for assistance in the enforcement of fair housing laws, and seeks to advance the national policy of "fair housing through the United States," 42 U.S.C. § 3601, in both federal and state courts.

Today integrated communities like Willingboro are beset with tensions and threat of instability created by "block-

---

* Letters of consent to the filing of this brief from counsel for the petitioners and the respondents have been filed with the Clerk of the Court.

busting" which lead to racial segregation, damaging entire communities. The fair housing laws seek to prevent the harm done by blockbusting and sanction efforts by all levels of government to this end. Willingboro's effort to preserve integration and stability is an instance of such enforcement at the local level. Indeed, early attention by local authorities may be the best and perhaps only effective remedy for blockbusting; it may be impossible to reverse the processes of panic and resegregation once underway.

ARGUMENT

Introduction

Although *amicus'* position in this case is that the ordinance prohibiting for sale signs is a valid enactment, it must be emphasized that such may not always be the case. Under other circumstances such an ordinance may result in barring blacks from equal access to housing. For example, in an all-white community where realtors control the housing market, the only way prospective black purchasers may be able to find houses is to tour the area looking for "for sale" signs.

In short, no absolute rule that these ordinances either are or are not valid is possible. In each case, the courts must carefully weigh a variety of factors, including the state of integration of the community, the accessibility of housing through realtors or newspaper advertising, and the history of the enactment of the ordinance in question. As we shall show below, the proper result in this case is to uphold the ordinance. In doing so, we urge that the Court should provide guidance to the lower courts to assist them in striking a proper balance between two purposes of the Fair Housing Act; ensuring full access to housing, and preventing the destructive effects of blockbusting.

Summary of Argument

The standard for determining the constitutionality of the Willingboro ordinance banning "for sale" and "sold" signs on residential property must accommodate the State's obligation to protect the right of black citizens to equal access to housing and the right of all Americans to open integrated communities, guaranteed by the Thirteenth and Fourteenth Amendments. The proper inquiry is (1) does the ordinance have a segregative effect; and (2) was the ordinance enacted to prevent the destructive segregating effects of fear and panic selling rather than to exclude minorities from residing in the community; the appeals court determination that the Willingboro ordinance was adopted pursuant to the town's obligations under the Thirteenth Amendment and Equal Protection Clause of the Fourteenth Amendment is clearly correct. The ordinance neither had the effect of nor was it intended to create racial segregation. On the contrary, it preserves racial integration in Willingboro. From this perspective, the ordinance's restriction of commercial speech does not violate the First Amendment.

I.

The Willingboro Ordinance Enforces the Fair Housing Guarantee of the Thirteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

A. *The National Fair Housing Guarantee.*

The Commission on Civil Rights' most recent report on fair housing finds that "[s]evere residential segregation and isolation between races and ethnic groups is a marked feature of virtually every metropolitan area in which minorities reside," [1] and that when blacks move to suburban

[1] U.S. Commission on Civil Rights, *Twenty Years After Brown: Equal Opportunity in Housing* 119 (1975). See also *Linmark As-*

communities they frequently find themselves in black enclaves which border central city neighborhoods.[2] "[R]eal estate agents have abetted th[e] process of racial change by playing on white fears and prejudices and inducing panic selling by whites . . . in countless neighborhoods across the Nation." [3]

> "First, a sense of panic and urgency immediately grips the neighborhood and rumors circulate and recirculate about the extent of the intrusion (real or fancied), the effect on property values and the quality of education. Second, there are sales and rumors of sales, some true, some false. Third, the frenzied listing and sale of houses attracts real estate agents like flies to a leaking jug of honey. Fourth, even those owners who do not sell are sorely tempted as their neighbors move away, and hence those who remain are peculiarly vulnerable. Fifth, the names of successful agents are exchanged and recommended between homeowners and frequently the agents are called by the owners themselves, if not to make a listing then at least to get an up-to-date appraisal. Constant solicitation of listings goes on by all agents either by house-to-house calls and/or by mail and/or by telephone, to the point where owners and residents are driven almost to distraction." [4]

The real estate industry's use of "for sale" and "sold" signs is a critical ingredient in "panic selling" for such signs tend "no less than overt blockbusting practices, to undermine any hope of . . . [racial] stability. Once this

---

sociates, Inc. v. *Township of Willingboro*, 535 F. 2d 786, 789 n. 1; *see also* U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia* 64 (1974).

[2] *Id.*

[3] *Id.* at 9.

[4] *United States* v. *Mitchell*, 335 F. Supp. 1004, 1006 (N.D. Ga. 1971).

hope is lost and complete racial transformation appears inevitable, even those desiring to remain are virtually forced to sell." *Barrick Realty, Inc.* v. *City of Gary, Indiana*, 354 F. Supp. 126, 135 (N.D. Ind.), *aff'd*, 491 F. 2d 161 (7th Cir. 1974). Ordinances banning such signs "remove a significant source of panic selling pressure from those who wish to remain in the . . . neighborhood." 354 F. Supp. at 135.[5]

Congress has clearly aligned the Nation with the residents of Willingboro in §804(e) of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3604(e), which makes it unlawful "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion or national origin." Legislative history indicates that Congress used the strongest language to condemn the effects of blockbusting in creating "new ghettos",[6] and recognized that the community suffered substantial injury from racially discriminatory housing practices, *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972).

Although Title VIII is "a detailed housing law, applicable to a broad range of discriminatory practices and

---

[5] See *infra*.

[6] The antiblockbusting provision was introduced by Representative Bingham as an amendment to Title IV of the Civil Rights Act of 1966, the predecessor to Title VIII which passed the House but not the Senate, 112 Cong. Rec. 18177 (1966), in order to overcome the "two evil results" of realtor windfall profits and "creating in the end a new black ghetto." Blockbusting was described as "one of the most evil situations accompanying and causing and flowing from segregation in housing", *id.* at 18178. Senator Mondale, the foremost proponent of Title VIII, compared blockbusting to "profit[ing] by booking young people with drug addiction" and "stealing wheelchairs from crippled children; it is as bad as you can think of . . ." Hearings on S. 1358, S. 2114 and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency, 90th Cong. 1st Sess. at 118 (1967). See also 114 Cong. Rec. 2273, 2275, 2692-2696, 2704, 2992 (1968).

enforceable by a complete arsenal of federal authority,"[7] the coordinate enforcement role of state and local authorities is recognized and made part of the statute's enforcement scheme. § 815 of Title VIII, 42 U.S.C. § 3615, expressly provides that Title VIII is not meant to preempt any state or local antidiscrimination measure "that grants, guarantees, or protects the same rights as are granted by this Title." Although "the authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development," the Secretary "shall consult with State and Local officials . . . .";[8] and Title VIII carefully integrates state and local enforcement authority into the very "arsenal of federal authority" in the enforcement provisions of Title VIII.[9]

Senator Mondale emphasized the need to supplement the increasing number of state and local government fair housing laws in introducing the Mondale-Brooke bill: "These scattered and local developments, far from absolving us from action, make it even more important than before that Congress enact a national fair housing law that will place all States and all localities upon an equal footing."[10] With respect to the antiblockbusting provision in § 804(e), 42 U.S.C. § 3604(e), legislative history is specific that antiblockbusting measures of state and local authorities, including, *"provisions . . . which go into the same thing"* are permitted and encouraged under the act.[11]

[7] *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968).

[8] § 809, 42 U.S.C. § 3609; see also § 816, 42 U.S.C. § 3616.

[9] See §§ 810 and 812, 42 U.S.C. §§ 3610 and 3612.

[10] 114 Cong. Rec. 2277; compare 2273, 2274, 2992 and 9554. Senator Mondale echoed Attorney General Clark's comments in hearing.

> "This legislation . . . would not in any way interfere with State and local governments in their efforts to enforce their laws. On the contrary, it would be designed to encourage and vitalize those efforts. And it would provide for the Secretary of Housing and Urban Development to encourage and support state and local governments in the enforcement of their laws and in the conduct of their affairs under those laws."

Hearings on S. 1358, S. 2114 and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency, *supra*, p. 15.

B. *The Willingboro Ordinance.*

Willingboro Ordinance No. 5-1974 is a legislative measure consistent with Title VIII. The history of the town, the sequence of events preceding enactment of the ordinance, and its impact compel the conclusion that the purpose of the measure was to control incitement of racial fears and panic selling induced by realtors' use of "for sale" and "sold" signs. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, No. 75-616 (January 11, 1977), slip op. at 11-15.

After racial exclusion by the developer of Willingboro was enjoined,[12] the town committed itself to becoming racially integrated.[13] However, shortly before the passage of the ordinance, residents became increasingly preoccupied with racial problems and fears of resegregation. Concern was expressed that local newspapers had published articles about racial tensions, blockbusting, and an influx of blacks into the community.[14]

The Willingboro Human Relations Commission recommended the ordinance because investigations demonstrated that realtors' use of "for sale" and "sold" signs had induced widespread fear and panic selling.[15] Those recommendations were endorsed by organizations devoted

[11] 112 Cong. Rec. 18177 (colloquy between Rep. Bingham and Rep. Colmer). See Appendix A, State and Local Anti-Panic Selling Provisions.

[12] *Levitt and Sons, Inc.* v. *Division Against Discrimination in State Department of Education*, 31 N.J. 514, 158 A. 2d 177, *appeal dism.*, 363 U.S. 418 (1960).

[13] See discussion at 535 F. 2d 786, 789.

[14] Joint Appendix, pp. 51a, 96a.

[15] Joint Appendix, pp. 233a, 234a-336a (Gladfelter); 239a-240a, 244a (Porter); 247a-248a, 251a (Lyght).

to civil rights, including the N.A.A.C.P.[16] At public hearings held by the Township Council to consider the ordinance, "[c]omplaints were stated regarding phone calls, letters and house-to-house solicitations by realtors inquiring whether the home owner wishes to sell;[17] about panic selling;[18] about 'sold' signs remaining up for six weeks in violation of an ordinance requiring their removal in five days (in response to which Council members cited the great difficulty of enforcement);[19] about the 'forest' of signs, which created the impression 'that there was something wrong with the community',[20] and consequent departure of persons who might otherwise have remained."[21] 535 F.2d at 791.

After two years of investigation, the Township Council enacted the ordinance. We submit that the *record* is crucial to resolution of this case and there is no evidence in the record to support the claim that the impact of the ordinance has been to discriminate against black home purchasers. And, of course, segregation is not its purpose. Indeed, the purpose was the opposite—maintenance of integration. Real estate agents testified at trial that sales had not diminished.[22] Willingboro public school enrollment statistics, which the court may judicially notice, show that the absolute number of black students has continued to increase

[16] 535 F. 2d at 793-794, n. 6. At the hearing, community residents were proponents of the ordinance while the real estate industry was its major opponent.

[17] See, *e.g.*, Joint Appendix, pp. 46a, 100a-101a.

[18] See, *e.g.*, Joint Appendix, p. 102a; see also pp. 158a, 162a-163a.

[19] See, *e.g.*, Joint Appendix, pp. 34a-35a, 39a, 85a, 89a, 90a, 93a-94a, 109a.

[20] See, *e.g.*, Joint Appendix, pp. 44a-45a, 63a-64a, 71a, 90a, 92a, 93a, 105a, 113a-114a.

[21] See, *e.g.*, Joint Appendix, p. 102a. Blockbusting was also raised. See *id.* at 96a, 111a; see also 158a.

[22] Joint Appendix, p. 163a.

after enactment of the ordinance, both systemwide and in almost every school.[23]

That the ordinance was enacted to prevent panic selling does not mean that an identical ordinance might not be passed elsewhere in order to exclude blacks or to have that effect. However, Willingboro is not a community which has no black residents, the ordinance was *not* passed in response to the entry of the first black family or families into the community, nor has the impact been to exclude black homeseekers from living in the township.[24] No facts which would support a finding of unconstitutionality under the Thirteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment are present here. In the absence of such a finding, "a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial . . . prejudice to another's hurt."[25] To use the First and Fourteenth Amendments "as a sword against such State power would surely stultify"[26] the national open housing policy.

[23] Brief For Respondent, Exhibit A.

[24] Compare discussion concerning Medford Lakes at 535 F. 2d at 803 n. 27, 811.

[25] *Railway Mail Assoc.* v. *Corsi*, 326 U.S. 88, 98 (1945) (Mr. Justice Frankfurter concurring).

[26] *Id.*

II.

The Willingboro Ordinance Is an Appropriate Means of Thwarting Panic Selling to Preserve an Integrated Community and Does Not Offend the First Amendment.

Unlike political and ideological dialogue, the posting of "for sale" signs is commercial product advertising which does "no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385 (1973).[27] This Court has consistently recognized that significant distinctions between commercial advertising and other types of speech support the need for differences in the degree and type of permissible regulation in each category. *Virginia State Board of Pharmacy* v. *Virginia Citizen's Consumer Council*, 425 U.S. 748 (1976); *Bigelow* v. *Commonwealth of Virginia*, 421 U.S. 809 (1975).

Moreover, unlike the statute in *Pittsburgh Press*, the Willingboro ordinance does not ban all advertisement of homes which are for sale, but rather allows such advertising by all means other than the posting of "for sale" signs on residential property. The fear expressed in *Virginia Board of Pharmacy* that a commercial message will not reach consumers is substantially weakened where the regulation only encompasses one of many channels of communication.[28] Indeed, at the trial which occurred nine

[27] The advertising here is distinguishable from the advertisement in *Bigelow* v. *Virginia*, *supra*, which announced the availability of legal abortions in New York and "contained factual material of clear 'public interest'". *Id.* at 822, or from other types of commercial advertisements which contain public interest elements. See *Virginia Pharmacy Board* v. *Virginia Citizens' Consumer Council*, *supra*, 425 U.S. at 760-761 and cases cited therein.

[28] Prior to the enactment of the ordinance, the real estate industry advertised by word of mouth and by newspaper advertisements. The majority of its business came from these sources, not from signs. Joint Appendix, pp. 33a, 36a.

months after the ordinance was passed and "for sale" signs had disappeared from Willingboro, witnesses testified that sales of homes had not diminished. Thus, as the Court noted in *Young* v. *American Mini Theatres*, "[v]iewed as an entirety, the market for the commodity is essentially unrestricted," —— U.S. ——, 49 L.Ed. 310, 321 (1976).

The analysis of the protection accorded commercial speech under the First Amendment has involved a careful balancing of the interests in each case. The interest of a community in protecting a seldom-achieved racial integration and in preventing the destructive segregating effects of a panic selling and blockbusting clearly outweighs the desire of real estate brokers to advertise by one particular method.[29]

[29] Suggestions in the briefs of petitioners and the American Civil Liberties Union as *amicus curiae* that the proper standard of review is the "clear and present danger" test or a "substantial governmental interest" test find no support in the Court's opinions.

The clear and present danger test, most recently refined in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), was formulated in cases arising under criminal syndicalism statutes which sought to punish on the basis of an individual's political beliefs. Because the freedom to possess such beliefs forms the core of First Amendment values, the principle emerged that "[t]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite such action." *Id.* at 447.

Nor is the rigid application of a "substantial governmental interest" test warranted. The touchstone of this Court's opinions in the commercial speech area has been flexibility; the varying types of commercial speech necessitate a separate consideration of all issues in each case. For example, as the Court noted, some advertisements contain "factual material of clear 'public interest'." Compare *Bigelow* v. *Virginia*, *supra*, 421 U.S. at 822 with *Pittsburgh Press Co.* v. *Pittsburgh Commission on Hum. Rel.*, *supra*. The burden of justifying regulation of the former may well have to be greater than the burden of justifying restriction on the latter, since "[t]he question whether speech is, or is not, protected by the First Amendment often depends on the context of the speech" and "[e]ven within the area of protected speech, a difference in context may require a different governmental response." *Young* v. *American Mini Theatres*, *supra*, 49 L. Ed. 2d at 323, 324.

A. *The Ban on "For Sale" and "Sold" Signs Is Closely Related to Illegal Discrimination in Housing.*

The question of "the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit" was explicitly left open in *Bigelow* v. *Virginia, supra,* 421 U.S. at 825. This Court observed, *id.* at 825, n. 10:

> "We have no occasion, therefore, to comment on decisions of lower courts concerning regulation of advertising in readily distinguishable fact situations. Wholly apart from the respective rationales that may have been developed by the courts in those cases, their results are not inconsistent with our holding here. In those cases there usually existed a clear relationship between the advertising in question and an activity that the government was legitimately regulating. See, *e.g., United States* v. *Bob Lawrence Realty, Inc.,* 474 F.2d 115, 121 (CA5), *cert. denied,* 414 U.S. 826, 38 L. Ed. 2d 59, 94 S. Ct. 131 (1973). *Rockville Reminder, Inc.* v. *United States Postal Service,* 480 F. 2d 4 (CA2 1973); *United States* v. *Hunter,* 459 F. 2d 205 (CA4), *cert. denied,* 409 U.S. 934, 34 L. Ed. 2d 189, 93 S. Ct. 235 (1972)."

The ban on "for sale" signs is not only related to, but specifically directed against, panic selling prohibited by the Fair Housing Title of the Civil Rights Act of 1968, 42 U.S.C. § 3604. *United States* v. *Bob Lawrence Realty, supra,* one of the cases cited in *Bigelow,* upheld the constitutionality of § 3604(e) of the Fair Housing Title, which forbids blockbusting.

> "Congress was aware that as laudable and necessary as the profit motive might be for our socio-economic system, it must on occasion yield to more humane and compassionate mores which are inherent in the system itself, and necessary for survival." [30]

The court in another case cited in *Bigelow* rejected a First Amendment challenge to the Fair Housing Title's proscription against discriminatory advertising, § 804(c), 42 U.S.C. § 3604(c). *United States* v. *Hunter, supra.*

Because of their success at manipulating racial fears, blockbusting practices ". . . constitute a fundamental element in the perpetration of segregated neighborhoods, racial ghettos and the concomitant evils which have been universally recognized to emanate therefrom."[31] The widespread posting of "for sale" signs is as intimately related as any other tactic of blockbusting to aggravation of racial hysteria, and setting in motion panic selling and resegregation in communities.

In *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations, supra,* a prohibition on publishing employment advertisements in sex-designated columns was challenged on First Amendment grounds. In upholding the prohibition, this Court stated:

> "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." [32]

The justification for the regulation lay not in the fact that the advertising explicitly violated a federal or local law,

---

[30] *Id.,* 474 F. 2d at 119.

[31] *Brown* v. *State Realty Co.,* 304 F. Supp. 1236, 1240 (N.D. Ga. 1969).

[32] 413 U.S. at 389.

but rather it "signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions." *Id.* So, too, the prevalence of "for sale" signs signals the incitement of racial panic inimical to the existence of "truly integrated and balanced living patterns," *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972) which the Fair Housing Title seeks to achieve.[33]

B. *The Proliferation of "For Sale" and "Sold" Signs in a Racially Tense Community Broadcasts a Threatening and Deceptive Message.*

In *Virginia Pharmacy Bd.* v. *Virginia Citizen's Consumer Council, supra,* 425 U.S. at 771, this Court stated: "We see no obstacle to a state dealing effectively" with the problem of "commercial speech [which] is not probably false, or even wholly false, but only deceptive or misleading." Such regulation is not uncommon. Where the potential for deception exists, this Court has consistently sustained prohibitions on advertising by certain professions. *Head* v. *Board of Examiners,* 374 U.S. 424 (1960) (optometrists); *Williamson* v. *Lee Optical,* 348 U.S. 483 (1958) (eyeglass frames); see *Virginia Pharmacy Bd.* v. *Virginia Citizen's Consumer Council, supra,* 425 U.S. at 773, n. 25. The power of the Federal Trade Commission to prohibit misleading as well as false statements in labeling and advertising "has long been recognized," *Young* v. *American Mini Theatres, supra,* 49 L. Ed. 2d at 328, n. 31,[34] and the authority of the Securities and Exchange Commission to regulate information disclosed in stock solicitations is

[33] See, *e.g., Barrick Realty, Inc.* v. *City of Gary, Indiana, supra,* 354 F. Supp. at 135; *United States* v. *Bob Lawrence Realty, supra; United States* v. *Mitchell,* 335 F. Supp. 1004, 1006 (N.D. Ga. 1971); *United States* v. *Mintzes,* 304 F. Supp. 1305 (D. Md. 1969); *Zuch* v. *Hussey,* 394 F. Supp. 1028, 1033, n. 7 (E.D. Mich. 1975).

[34] See, e.g., *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608 (1946); *Donaldson* v. *Read Magazine, Inc.,* 333 U.S. 178 189 (1948); *National Commission on Egg Nutrition* v. *FTC,* 517 F. 2d 485 (7th Cir. 1975); *E. F. Drew & Co.* v. *FTC,* 235 F. 2d 735, 740 (2d Cir. 1956).

settled, *United States* v. *Re,* 336 F. 2d 306 (2d Cir.), *cert. denied,* 370 U.S. 904 (1964). And while there is a challenge to laws barring advertising by, for example, lawyers, there seems to be no serious claim that such advertising may be conducted totally unrestrained as to time, place and manner.

"For sale" signs are obviously not literally false advertising when placed in front of houses currently on the market.[35] However, regulation is permissible to prevent the more subtle but often graver evils caused by messages which, although literally true, convey underlying illegal or antisocial meanings. For example, to determine whether an advertisement is deceptive or misleading and subject to regulation or prohibition, the FTC employs a standard that is based not on proof of actual falsehood but on the "capacity to deceive" the typical audience which will receive the message. See, *e.g., Charles of the Ritz Distribs. Corp.* v. *FTC,* 143 F.2d 676, 680 (2d Cir. 1944); Note, *Development in the Law—Deceptive Advertising,* 80 HARV. L. REV., 1005, 1040, *et seq.* (1970).

That whether a message is deceptive depends on the particular context in which it is delivered is also clear in the area of labor relations. In *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 619 (1969), the question whether an employer's statements were misleading or coercive and, as a result an unfair labor practice, turned not on the literal language of the speech but "on the question: "[W]hat did the speaker intend and the listener understand?" In *Gissel,* this Court reasoned that:

> ". . . any balancing [of the employer's right of free speech against the employees' right to associate] must

[35] They became false, however, if allowed to remain in front of property that has been sold, a practice prevalent in Willington prior to the enactment of the ordinance. Joint Appendix, p. 38a. Signs often remained up for weeks after houses were sold. Joint Appendix, p. 34a.

take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications that might be more readily dismissed by a more disinterested ear." *Id.* at 617.

"[T]he understood impact" of "for sale" signs can only be viewed in the context of the racial tensions in suburban communities, the various uses for which real estate brokers employ "for sale" signs, and the actual reactions of the Willingboro residents to the practices of the real estate industry.[36] Within this context, "for sale" signs convey not merely a notice of available housing, but a threat to white homeowners which preys on their racial fears, induces panic selling, fosters blockbusting and invites resegregation.

C. *"For Sale" and "Sold" Signs Are Thrust Upon a Captive Audience.*

As destructive as the message conveyed by the "for sale" signs is, the continual bombardment of the message on the public is impossible to avoid.[37] Given the community's physical layout, a drive through any residential section of Willingboro would subject a person to a "forest" of signs.

This Court has recognized that "restrictions have been upheld . . . when the degree of captivity makes it impractical for the . . . viewer . . . to avoid exposure," *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1976). Mr. Justice Douglas stated, "[w]hile petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it," *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Mr. Justice Douglas, concurring).

[36] See *supra*, Point I.

[37] As the Court of Appeals observed, Willingboro dwellings were built in a line, as is typical of Levitt developments, with each house placed the same distance from the street on lots having 60-70 foot street footage.

The Willingboro ordinance in no way restricts the placement of "for sale" advertisements in newspapers; it does not prevent word of mouth or other dissemination. It only restricts display signs. As Mr. Justice Brandeis stated for a unanimous court in *Packer Corp.* v. *Utah*, 285 U.S. 105, 110 (1932):

> ". . . [T]here is a difference which justifies the classification between display advertising and that in periodicals or newspapers . . . Advertisements of this sort are constantly before the eyes of observers on the streets . . . without the exercise of choice or violation on their part . . . In the case of newspapers and magazines, there must be some seeking by one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or . . . streetcar placard."

And, just like those for whom a public transit system is the necessary mode of transportation, the residents of suburban Willingboro use the streets, "as a matter of necessity, not of choice." *Public Utilities Comm'n.* v. *Pollock*, 343 U.S. 451, 468 (1952) (Mr. Justice Douglas, dissenting), *cited with approval in Lehman* v. *City of Shaker Heights, supra*, 418 U.S. at 302.

Regulation of billboards on streets is not unprecedented. A state statute may permit highway billboards to advertise businesses located in the neighborhood, but not elsewhere. *Markham Advertising Co.* v. *State*, 73 Wash. 2d 405, 439 P.2d 248, *appeal dism.*, 393 U.S. 316 (1969). The Highway Beautification Act of 1965, 23 USC § 131, 23 U.S.C.A. § 131, authorizes states to adopt regulations which may significantly curtail use of such signs. If concern for aesthetics warrants regulation of placard advertisements, the national

goal of open housing and prohibition of blockbusting demand no less. Exposure to "for sale" and "sold" signs is of a qualitatively different nature than the exposure to the offending jacket in *Cohen* v. *California*, 403 U.S. 15, 21 (1969), where the public could "effectively avoid further bombardment of their sensibilities simply by averting their eyes." The ordinance's restriction of "for sale" signs is a justifiable method of preventing the use of the signs' deliberate "[visual] assault" on the public as a tool in panic selling.[38]

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to affirm the judgment of the appeals court.

Respectfully submitted,

JACK GREENBERG
CHARLES STEPHEN RALSTON
MELVYN R. LEVENTHAL
BILL LANN LEE
LINDA S. GREENE
BETH J. LIEF
10 Columbus Circle
Suite 2030
New York, New York 10019

Attorneys for Amicus Curiae,
NAACP Legal Defense and
Educational Fund, Inc.

[38] *Rosenfeld* v. *New Jersey*, 408 U.S. 901, 906 (1972) (Mr. Justice Powell, dissenting), *quoted with approval in Erznoznik* v. *City of Jacksonville, supra*, 422 U.S. at 210 n. 6.

APPENDIX

APPENDIX A

State and Local Anti-Panic Selling Provisions

Before and since passage § 804(e) of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604(e), states and localities have enacted a variety of measures to counter blockbusting or panic selling by attacking different aspects of the process. Title VIII's approach of banning, *inter alia,* representations regarding the entry into the neighborhood of persons of a particular race or color made for profit, in fact, is based on laws in effect in Ohio and Maryland.[1] With respect to such laws, several states expressly prohibit indirect as well as direct reference to neighborhood transition,[2] some specify the kind of representations prohibited,[3] and some do not limit representations only to those made "for profit."[4] Some states and localities provide compen-

---

[1] 112 Cong. Rec. 18177 (Rep. Bingham), see *e.g.,* Md. Ann. Code Art. 56, § 230A (1968); Ohio Rev. Code Ann. § 4112.02 (Supp. 1970); Minn. Stat. Ann. § 363.03(2) (4) (Supp. 1971); *Chicago Real Estate Board* v. *City of Chicago,* 36 Ill. 2d 530, 533-534, 224 N.E. 2d 793, 797 (1967).

[2] See, *e.g.,* Mich. Stat. Ann. § 26.1300 (203) (1970).

[3] See *supra,* n. 1. Representative Bingham's original amendment to H.R. 14765 specifically prohibited the following representatives: "lowering of real estate values in the area concerned," "deterioration in the character of the area concerned," "an increase in criminal or anti-social behavior in the area concerned," and "a decline in the quality of the schools or other public facilities serving the area." See 112 Cong. Rec. 18179-18180.

[4] See, *e.g.,* Ill. Am. Stat. ch. 38, § 70-51(b)-(c) (Smith-Hurd Supp. 1971); Md. Ann. Code art. 56, § 230A (Supp. 1970); Ohio Rev. Code Ann. § 4112.02 (H) (9) (1970); Wis. Stat. Ann. § 101.60(2m) (Supp. 1971); Annapolis, Md. City Code § 8-3(a) (5) (1970); Buffalo, N.J., Ordinance § 350 (1970); Detroit, Mich., Code § 39-1-13.1 (1970); Evanston, Ill, Code § 25-½-6 (1970); Green Bay, Wis., Code of Gen. Ordinances ch. 32.05 (1968); Oklahoma City, Okla. Ordinance 11,848 (1969); Teaneck, N.J. Ordinance 1274 (1966).

satory relief such as damages,[5] while others specify injunctive relief,[6] criminal sanction,[7] or license revokation.[8] Other statutes or ordinances prohibit door-to-door solicitation made without the consent of the homeowner[9] or suspend solicitation for a period where blockbusting is threatened.[10] Other provisions prohibit incitement, harrassment, intimidation, threats or other conduct that induces panic selling.[11]

"Local ordinances have been passed to eliminate one of the blockbuster's major weapons by regulating the size and location of 'for sale' signs so as to limit their capacity to induce panic." [12] Some localities limit the time a 'for

[5] See, *e.g.*, N.Y. Exec. Law § 297 (McKinney Supp. 1970).

[6] See, *e.g.*, Kan. Stat. Ann. § 44-1022 (Supp. 1971); N.Y. Exec. Law § 297(6) (McKinney Supp. 1970); Alexandria, Va. Code § 17A-4 (1969); Green Bay, Wisc., Code of Gen. Ordinances ch. 32.05 (1968).

[7] See, *e.g.*, Md. Ann. Code at art. 56, § 230A (1968); Wis. Stat. Ann. § 101.60(6) (Supp. 1971); Mich. Stat. Ann. § 26.1300 412 (1970).

[8] See, *e.g.*, Conn. Gen. Stat. Ann. §§ 20-320(11), -328 (1969); D.C. Code Ann. § 45-1403 (1967); N.Y. Exec. Law § 296(3) (McKinney Supp. 1969).

[9] See, *e.g.*, *Summer* v. *Township of Teaneck*, 53 N.J. 548, 251 A.2d 761 (1969) (Teaneck ordinance requiring permit upheld); *cf. Breard* v. *City of Alexandria*, 341 U.S. 622 (1951).

[10] Dayton Ordinances, §§ 115-e (k), & 115-k; New York City Admin. Code, ch. 1, Title C, C1-1.0 *et seq.*; see Blockbusting A Novel Statutory Approach To An Increasingly Serious Problem, 7 Colum. J. L. & So. Prob. 538 (1971).

[11] Buffalo, N.Y., Ordinance ch. VII, art. XVIII, § 351(a) (1970); Pa. Real Estate Comm'n Regulations 15.9, 15.10, September 22, 1966; Ill. Ann. Stat. ch. 38, § 70-51(c) (Smith-Hurd Supp. 1971); Annapolis, Md. Code § 8-3(a) (5) (b) (1970).

[12] Comment, Blockbusting, 50 Geo. L. J. 170, 173 (1970); see, *e.g.*, Detroit, Mich. Ordinance 753-F, *reprinted in* 7 Race Rel. L. Rptr. 1256 (1962); Teaneck N.J., Ordinance 1157, *reprinted in* 7 Race Rel. L. Rptr. 1262 (1962).

sale' or 'sold' sign may be posted. Willingboro, for instance, before prohibiting signs altogether had a provision regulating the size, restricting its placement within property lines, and requiring that "[s]uch signs shall be removed within five days after the execution of any lease, rental agreement or agreement of sale for the premises in question by the occupant of the premises and/or the owner of the sign." [13] It was widespread abuse of this ordinance by realtors[14] that led the Willingboro Township Council to enact Ordinance No. 5-1974[15] which repealed the prior ordinance. Prohibition of "for sale" and "sold" signs is an approach adopted by other local authorities as well.[16] Indeed, trial testimony indicates that Willingboro "contacted National Neighbors and found out that there were some other communities throughout the country that have done this type of ordinance," [17] and then contacted one, Shaker Heights, Ohio.[18]

[13] Willingboro, N.J. Ordinance Chap. XVIII, § 17-6.5, *reprinted in* Joint Appendix, p. 14a.

[14] See, *supra*, p. 8, n. 19.

[15] Joint Appendix, p. 27a.

[16] See, *e.g.*, *Barrick Realty Inc.* v. *City of Gary*, 354 F. Supp. 126 (N.D. Ind. 1973), affirmed, 491 F.2d 161 (7th Cir. 1974) (Gary, Ind. Ordinance No. 4685 upheld); Chicago, Ill. Mun. Code, Ch. 198.7B and Ch. 113-28; Milwaukee Code of Ord. §16.3 (14.1) (limited to licensed real estate brokers and salesmen).

[17] Joint Appendix, p. 184a.

[18] *Id.* at 184a-185a.

Supreme Court, U. S.
FILED
JAN 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-357

LINMARK ASSOCIATES, INC. and
WILLIAM MELLMAN,
Petitioners,

v.

THE TOWNSHIP OF WILLINGBORO and
GERALD DALY,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF FOR AMICUS CURIAE CITY OF OAK PARK, MICHIGAN

BURTON R. SHIFMAN, P. C.
By: BURTON R. SHIFMAN
PHILIP J. GOODMAN
DAVID M. BLACK
Attorneys for Amicus Curiae
City of Oak Park, Michigan
1106 Travelers Tower
Southfield, Michigan 48076
Phone: 313 - 358-0820

Interstate Brief & Record Co., 43 Abbott St., Detroit, Michigan 48216
961-4798

TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	1
Summary of Argument	3
Argument	5
I. The Willingboro Ordinance Banning "For Sale" and "Sold" Signs Does Not Violate Petitioners' Asserted Rights of Free Speech Under the First and Fourteenth Amendments	5
A. The Nature of the Commercial Advertising in This Case Distinguishes the Free Speech Rights Asserted From Those Entitled to Full First Amendment Protection	5
B. The Willingboro Ordinance is a Legitimate Time, Place, and Manner Regulation of Petitioners' Asserted First Amendment Interests	9
1. The Regulation is Within the Constitutional Power of the Government	9

Page

2. The Regulation Furthers An Important Governmental Interest Which Cannot Be Achieved Through Less Burdensome Means 12

a. The Government has a substantial interest in discouraging panic selling and its causes 12

b. The means adopted are sufficiently narrow and no adequate alternative means exist to control "For Sale" and "Sold" signs and their contribution to panic selling 17

3. The Governmental Interest Is Unrelated To The Suppression Of Free Expression 19

4. Alternative Channels Of Communication Are Open To Petitioners 20

II. The Governmental Interest Outweighs Petitioners' Asserted First Amendment Rights 22

III. The Willingboro Ordinance Violates Neither the Equal Protection nor the Due Process Clauses of the Fourteenth Amendment 23

Conclusion 26

Appendix A — City of Oak Park, Michigan, Ordinance No. 0-73-24 27

INDEX TO AUTHORITIES CITED

Cases: Page

Barrick Realty, Inc. v. City of Gary, Indiana, 354 F.Supp. 126 (N.D. Ind., 1973) 13,14,20

Barrick Realty, Inc. v. City of Gary, Indiana, 491 F. 2d 161 (7th Cir. 1974) 7,8,21

Bibb v. Navajo Freight Lines, Inc., 359 US 520 (1959) . 22

Bigelow v. Virginia, 421 US 809 (1975) 6,16

Breard v. Alexandria, 341 US 622 (1951) 23

Brown v. State Realty Co., 304 F.Supp. 1236 (N.D. Ga. 1969) 15

Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (D.C. 1971) aff'd sub nom Capital Broadcasting Co. v. Kleindienst, 405 US 1000 (1972) 17

Chicago Real Estate Board v. City of Chicago, 36 Ill. 2d 530, 224 NE2d 793 (1967) 25

Dennis v. United States, 183 F2d 210 (2nd Cir. 1950) aff'd 341 US 494 (1951) 9

Erznoznik v. City of Jacksonville, 422 US 205 (1975) 6,7,9

James v. Strange, 407 US 128 (1972) 11

Kovacs v. Cooper, 336 US 77 (1949) 20

Linmark Associates, Inc. v. Township of Willingboro, 535 F2d 786 (3rd Cir. 1976) 8,12,15

McGowan v. Maryland, 366 US 420 (1961) 8

Page

NAACP v. Button, 371 US 415 (1936) 22

Nebbia v. New York, 291 US 502 (1934) 2

Nebraska Press Association v. Stuart, — US —, 49 LEd2d 683 (1976) 19

Patsone v. Pennsylvania, 232 US 138 (1914) 25

Pell v. Procunier, 417 US 817 (1974) 22

Pittsburgh Press Company v. Human Relations Commission, 413 US 376 (1973) 7

Rowan v. United States Post Office Department, 397 US 728 (1970) 22

Southeastern Promotions, Limited v. Conrad, 420 US 546 (1975) 6

Tinker v. Des Moines, 393 US 503 (1969) 15

United States v. Bob Lawrence Realty, Inc., 474 F2d 115 (5th Cir.) cert den 414 US 826 (1973) 13

United States v. Hunter, 459 F2d 205 (4th Cir.) cert den 409 US 934 (1972) 7

United States v. Mintzes, 304 F.Supp. 1305 (D. Md. 1969) 14

United States v. O'Brien, 391 US 367 (1968) 9,10,11,24

Valentine v. Chrestensen, 316 US 52 (1942) 23

Village of Belle Terre v. Borass, 416 US 1 (1974) . 10,25

Page

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., — US —, 48 LEd2d 346, 96 S.Ct. 1817 (1976) 5,6,8,9,23

Constitution, Statutes, Ordinances and Court Rules:

23 USC §131 23

42 USC §3604(e) 8,13,19

City of Oak Park, Michigan, Ordinance No. 0-73-24 (Code of Ordinances, City of Oak Park, Michigan §3.4) 2

Township of Willingboro, New Jersey, Ordinance No. 5-1974 3

United States Supreme Court Rule 42, paragraph 4. ... 3

Miscellaneous:

Bisceglia, *Blockbusting: Judicial and Legislative Response to Real Estate Dealers' Excesses*, 22 DePaul L. Rev. 818 (1973) 14

Page

Jung, *Control of Panic Selling by Regulation of "For Sale" Signs*, 10 Urban Law Annual 323 (1975) ... 13,15

Hayes, *The Constitutionality of a Municipal Ordinance Prohibiting "For Sale", "Sold" or "Open" Signs to Prevent Blockbusting*, 14 St. Louis University L. J. 686 (1970) 10

Note, *Blockbusting*, 59 Georgetown L. J. 170 (1970) 14,18

Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of the Administrative Process*, 74 Yale L. J. 1171 (1965) 18

6 McQuillin, *Municipal Corporations* (3rd ed. 1969) 10,16,25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-357

LINMARK ASSOCIATES, INC. and WILLIAM MELLMAN,
Petitioners,
v.
THE TOWNSHIP OF WILLINGBORO and GERALD DALY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR AMICUS CURIAE CITY OF OAK PARK, MICHIGAN

INTEREST OF AMICUS CURIAE

The City of Oak Park, a Michigan municipal corporation, is a community with a population of approximately 36,762 (1970 Census) bordering the northwest boundary of the City of Detroit, Michigan. On

August 6, 1973 the City Council for the City of Oak Park passed Ordinance No. 0-73-24 (Code of Ordinances, City of Oak Park, Michigan Section 3.4) which ordinance regulates the use of signs in connection with single family and two-family dwellings. The Oak Park ordinance excludes all signs with certain exceptions and thus the form and thrust of the Oak Park ordinance are similar to those of the Willingboro, New Jersey ordinance at issue in the present case. Under Oak Park Ordinance No. 0-73-24 the placement of "for sale" or "sold" signs in single family and two family residential zoning districts is unlawful. A copy of Oak Park Ordinance No. 0-73-24 is attached as Appendix A to this Brief.

The Oak Park ordinance was passed in part as a direct response to evidence that "blockbusting" tactics were being employed by some area realtors in the City of Oak Park. The Council found that a proliferation of "for sale" and "sold" signs was an integral part of blockbusting tactics and that the signs constituted highly visible symbols that the character of the City was rapidly changing. To hinder the efforts of blockbusters and to remove a major source of fear of rapid neighborhood deterioration which the Council found was engendering a desire in many white homeowners to sell in panic and leave the City, the City Council banned the use of "for sale" and "sold" signs.

Aside from a few initial complaints by realtors the Oak Park Ordinance has not been seriously questioned nor decried. Conversely, the general community reaction has been favorable and property turnover and integration continue in an orderly manner beneficial to the welfare of the entire community.

Since the Oak Park ordinance bears such similarity to the Willingboro ordinance and since the Oak Park City Council at the time of the ordinance's passage shared many of the concerns experienced and envisioned by the Willingboro Township Council, the City of Oak Park respectively submits this *amicus curiae* brief in support of the position of the Respondents that the Township of Willingboro Ordinance No. 5-1974 is a valid and constitutional exercise of municipal police powers.

This brief is sponsored by Burton R. Shifman, P.C., the authorized City Attorney of the City of Oak Park, Michigan, a Michigan municipal corporation, and thus, pursuant to United States Supreme Court Rule 42, paragraph 4 consent of the parties to the filing of this *amicus curiae* brief is not required.

SUMMARY OF ARGUMENT

Commercial advertising is not unprotected by the First Amendment, but the Petitioners' asserted First Amendment rights involve merely a proposal of a commercial transaction which is not among that type of speech the restraint of which must be justified by a substantial governmental interest.

The governmental interest in prohibiting panic selling is, nevertheless, substantial; and the ordinance in question, a legitimate exercise of the police power, seeks removal by the only possible effective means of highly visible symbols, which, in the judgment of the legislative body, contribute significantly to the fear psychology upon which panic selling thrives. The cause and effect

relationship between signs and panic selling is not only complex but involves the assessment of local conditions. In the latter regard the judgment of the legislative body should not be overturned unless it is manifestly improper.

The restrictions are aimed not at the content of the advertising but rather at the very presence of the signs, and given the fact that ample alternative means of communicating the advertisement exist, the ordinance may be justified as a legitimate time, place, and manner restriction on First Amendment freedoms.

The balancing of competing interests is an approach which considers many of the factors viewed in the application of a time, place, manner test. In this regard, the governmental interest in removing a cause of panic selling which may have devastating effects on the stability and general well being of the community clearly outweighs the private interest in choosing the means of commerical solicitation.

The ordinance also withstands equal protection and due process challenges since it is not arbitrary or capricious, makes no discrimination on its face, and does not have an inevitable discriminatory effect which is evidenced on the record. In any event, the traditional standards by which due process and equal protection claims are judged are less stringent than the various First Amendment tests utilized by this Court, and therefore the resolution of these latter claims will be subsumed by the decision on the First Amendment issues.

ARGUMENT

I

THE WILLINGBORO ORDINANCE BANNING "FOR SALE" AND "SOLD" SIGNS DOES NOT VIOLATE PETITIONERS' ASSERTED RIGHTS OF FREE SPEECH UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

A.

THE NATURE OF THE COMMERCIAL ADVERTISING IN THIS CASE DISTINGUISHES THE FREE SPEECH RIGHTS ASSERTED FROM THOSE ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

Petitioners assert correctly that, in the classic case, a prior restraint on speech may be justified only by a governmental showing of a paramount interest (Brief for Petitioners, p. 18). Petitioners also contend correctly that *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, ___ US ___, 48 LEd2d 346, 96 S.Ct. 1817 (1976), forecloses the argument that commercial speech enjoys no protection under the First Amendment. However, this Court did in that case acknowledge categories of commercial speech which could be distinguished on the basis of content, ___ US ___, 48 LEd2d at 358, and found that commercial speech could still be differentiated from other forms of speech enjoying unlimited First Amendment protection:

> "There are common sense differences between speech that does 'no more than propose a commercial transaction' Pittsburgh Press Co. v.

> Pittsburgh Commission on Human Relations, 413 US at 385, 37 LEd2d 669, 93 S.Ct. 255, and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the state, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." ___ US ___, 48 LEd2d at 364, fn 24.

The present case involves speech which merely suggests a commercial transaction and therefore when other circumstances are considered the protection to which it is entitled may be of a "different degree."

A second factor distinguishing the present ordinance from classic prior restraint situations is that the prohibition is not total. The proscription is very narrow; only "for sale" and "sold" signs are prohibited; and thus the incidental effect on speech is minimized. Accordingly, the instant prior restraint is not analogous to the total prohibitions struck down in such cases as *Bigelow v. Virginia*, 421 US 809 (1975) and *Erznoznik v. City of Jacksonville*, 422 US 205 (1975).

The applicability of the prior restraints doctrine may be further distinguished on a theoretical basis. As this Court stated in *Southeastern Promotions Limited v. Conrad*, 420 US 546 (1975):

> "The presumption against the prior restraints is heavier — and the degree of protection broader — than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse the rights of

> speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between iegitimate and illegitimate speech is so finely drawn that the risks of free-wheeling censorship are formidable. See *Speiser v. Randell*, 357 US 513, 2 LEd2d 1460, 78 S.Ct. 1332 (1958)" 420 US at 558-559. (emphasis by the Court)

The evil of free-wheeling censorship is not present in the instant case since the precise nature of the communication is known beforehand. Only that form of communication is incidentally infringed upon and there is no danger that other constitutionally permissible speech would be swept into the ordinance's prohibition. cf. *Erznoznik, supra*.

Additionally, this case can be said to fall into the generic concept established in such cases as *Pittsburgh Press Company v. Human Relations Commission*, 413 US 376 (1973) and *United States v. Hunter*, 459 F2d 205 (4th. Cir.) *cert. den.* 409 US 934 (1972), both of which upheld, against First Amendment claims, the constitutionality of statutes prohibiting illegal communication. In this regard the Court of Appeals for the Seventh Circuit noted in *Barrick Realty, Inc. v. City of Gary, Indiana*, 491 F2d 161, 163 (7th Cir. 1974):

> "The reasoning is not applicable with full force here, because 'for sale' signs are forbidden even if they do not contain an explicit reference to race analogous to the sex designations in *Pittsburgh Press*. However, the effect of 'for sale' signs was inconsistent with public policy as expressed in the Gary Civil Rights Ordinance . . ."

So too, the ordinance in the present case seeks to remove a cause of a condition detrimental to the general welfare of the community and in this sense the ordinance prohibits a definite evil.

To distinguish the *Barrick Realty* case as the District Court did in the present case by arguing that in Gary, Indiana the damage was already occurring (Petition for Certiorari, App. B p. 4) is as the Court of Appeals noted: " . . . an exaltation of form over substance." *Linmark Associates, Inc. v. Township of Willingboro*, 535 F2d 786, 800 (3rd Cir. 1976). This approach closes the barn door after the horses have escaped and ignores the example of such constitutional ordinances as 42 USC §3604(e) (Federal Fair Housing Act) which proscribe mere attempts to incite "white flight".

Thus, the present ordinance is distinguishable from the typical instances of prior restraints on speech which this Court has held invalid. These several differentiating factors, when coupled with the facts that 1) real estate advertising is "hardy" and 2) the regulation does not chill other forms of commercial real estate advertising, place "for sale" and "sold" signs in that category of commercial speech to which this Court recognized in *Virginia State Board of Pharmacy, supra* "the prohibition against prior restraints" may be "inapplicable". ___ US ___, 48 LEd2d at 364, fn 24. Consequently, the contravening governmental interest need not be as fundamental or compelling as in the usual case and the test to be applied should be one akin to requiring a showing of a reasonable and rational relationship of the means to the ends sought to be accomplished. *McGowan v. Maryland*, 366 US 420, 425-428 (1961).

B.

THE WILLINGBORO ORDINANCE IS A LEGITIMATE TIME, PLACE AND MANNER REGULATION OF PETITIONERS' ASSERTED FIRST AMENDMENT INTERESTS.

The time, place, manner test, if it may be so characterized, was carefully explicated in *United States v. O'Brien*, 391 US 367 (1968), and has been recently recognized in *Virginia State Board of Pharmacy, supra*, and *Erznoznik v. City of Jacksonville, supra*. This test or approach may be distinguished in certain regards from the doctrines of cases such as *Dennis v. United States*, 183 F2d 210 (2nd Cir. 1950) aff'd 341 US 494 (1951) upon which Petitioners rely at p. 18 of their Brief. In writing for this Court, then Chief Justice Warren explains this test as follows:

> " . . . we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 US at 377.

These four factors are discussed individually in the following sections.

1. The Regulation Is Within The Constitutional Power Of The Government.

The ordinance in question is essentially an exercise of the police power of the township legislative body. This

power is delegated to the municipality and its legislative body by the state and embraces:

> " . . . the promotion of the public convenience or the general prosperity as well as the public safety, health and morals." 6 McQuillin, *Municipal Corporations* (3rd ed. 1969) §24.08 p. 483-484.

As the District Court recognized, legislative enactments are presumptively valid (Petition for Certiorari, App B p. 6) and there can be no real doubt that the township has the power to legislate in this area. See also: *Village of Belle Terre v. Borass*, 416 US 1, 32-33 (1974) and Hayes, *The Constitutionality of a Municipal Ordinance Prohibiting "For Sale", "Sold" or "Open" Signs to Prevent Blockbusting*, 14 St. Louis University L. J. 686, 689-691 (1970).

The District Court found (Petition for Certiorari, App B p. 6) and Petitioners' contend (Brief for Petitioners p. 33) that the ordinance is invalid due to an allegedly improper motivation on the part of the Willingboro council. This approach ignores the well settled doctrine that it is the demonstrable effect and not the legislative motivation that is considered in testing an ordinance's constitutionality.

In *United States v. O'Brien, supra*, this Court states:

> "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:
>
> 'The decisions of this Court from the beginning lend no support whatever to the

> assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.' McCray v. United States, 195 US 27, 56, 49 LEd 78, 95, 24 S.Ct. 69 (1904)". 391 US at 383.

Neither, should the test of constitutionality center entirely on the effectiveness of the ordinance as Petitioners contend (Brief for Petitioners, p. 24). In *James v. Strange*, 407 US 128, 133-134 (1972) this Court opines:

> "Our task, however, is not to weigh the statutes' effectiveness but its constitutionality. Whether the returns under the statute justify the expense, time, and efforts of state officials is for the on-going supervision of the legislative branch."

Furthermore, the cause and effect relationship between "for sale" and "sold" signs and panic selling is a highly complex matter which will depend in large part on gauging the psychological climate of the geographical area as exhibited by the opinions and reactions of a majority of the residents. The Willingboro council did not act precipitously and the judiciary should not be quick to substitute its judgment in such complex matters, unique to each given community.

These principles, coupled with the well settled presumption of validity which legislative enactments enjoy serves to foreclose any argument that the Willingboro ordinance should fall because of improper motives on behalf of the Township council or lack of

effectiveness of the ordinance. The burden is upon Petitioners to demonstrate an impermissible effect and there is no evidence on the record to support the contention that the effect of the ordinance was to promote racial imbalance by excluding minorities. The Township's Exhibit D-1 (Petition for Certiorari, App A at 36; U.S.C.A. Joint Appendix at 128A, Brief for Petitioners p. 35) demonstrates that as of 1970 Willingboro Township was an integrated community and that as of 1973 the percentage of nonwhite population had risen. This exhibit can stand for nothing more. Petitioners and the District Court below would apparently dictate what the white-nonwhite ratio should be, but they have failed to demonstrate from evidence on the record that the sign ordinance has prevented or affected the attainment of their desired ratio in any manner.

Finally, the District Court and Petitioners are completely wrong in attaching a stigma to a desire to achieve neighborhood stability by maintaining a reasonable balance. Minority groups have the right not to have to move from one ghetto to another. As the Court of Appeals below noted, national policy favors racial balance. *Linmark Associates, Inc., supra*, 535 F2d at 797 fn 14.

2. The Regulation Furthers An Important Governmental Interest Which Cannot Be Achieved Through Less Burdensome Means.

a. The Government has a substantial interest in discouraging panic selling and its causes.

Panic selling is a well recognized phenomena and its effects are deleterious to the best interests of any

community. The District Court in *Barrick Realty, Inc. v. City of Gary, Indiana*, 354 F. Supp. 126 (ND Ind. 1973) defined the problem of panic selling:

> " 'Blockbusting', or 'panic peddling', is not the same as panic selling. Blockbusting refers to the practice of directly inducing or persuading an individual to sell his home by representations as to the entry into his neighborhood of blacks or other minority groups. Panic selling is a broader problem which, although it may be prompted by blockbusting practices, does not depend on direct inducements or face to face contact between people. Panic selling occurs when a resident who is otherwise disposed to remain in a neighborhood succumbs to any one or more of the number of pressures to move out when it appears that a minority racial group is beginning to enter."

This definition was elaborated upon in Jung, *Control of Panic Selling by Regulation of "For Sale" Signs*, 10 Urban Law Annual 323, 324 (1975):

> "It is apparent that the inducement of panic selling is a necessary element of blockbusting in that panic selling, since it can occur without the intervention of blockbusters, is a much broader problem than blockbusting."

That blockbusting itself is an evil which the government may legitimately prohibit is beyond contention. 42 USC §3604(e) specifically prohibits blockbusting activities and the constitutionality of this statute has been upheld as against First Amendment claims in both *United States v. Bob Lawrence Realty, Inc.*, 474 F2d 115 (5th Cir.) *cert den* 414 US 826 (1973)

and in *United States v. Mintzes*, 304 F. Supp. 1305 (D Md. 1969). Both blockbusting and panic selling affect the very fiber of social well being, and the ability of a municipality to inhibit the spread of these evils and their deleterious effects by removing a significant root cause is therefore undoubtedly of utmost importance to the community at large.

The cause and effect relationship between these signs and panic selling has been recognized in the past. It seems to be well accepted, for example, that "for sale" and "sold" signs are a tool of blockbusters. See Bisceglia, *Blockbusting: Judicial and Legislative Response to Real Estate Dealers' Excesses*, 22 DePaul L. Rev. 818, 820 (1973), and Note, *Blockbusting*, 59 Georgetown L. J. 170, 173 (1970). The role of "for sale" and "sold" signs in panic selling was recognized by the court in *Barrick Realty, Inc. v. City of Gary, Indiana*, 354 F.Supp. at 135-136. Indeed, it has been suggested that:

> "Conventional legislative attempts to halt blockbusting have not dealt directly with the problem of panic seliing but have focused instead upon regulation of the individual blockbuster. The emphasis upon restricting would be blockbuster's representations, solicitations and conduct reveals the basic flaw in conventional anti-blockbusting legislation, which rests on the philosophically naive premise that blockbusting can be halted by stopping blockbusters. The premise dictates regulation of the blockbuster as the means of controlling, albeit indirectly, neighborhood destabilization and panic selling and is partly responsible for the limitation of statutory prohibitions to only the most overt blockbusting violations.

* * * *

> "Close examination of the Gary ordinance reveals that it is more than a different approach to panic selling because it implicitly recognizes that the broader problem of panic selling and neighborhood destabilization can be controlled only by decreasing the fears of white residents. The ordinance deals directly with these critical problems by removing a significant source of residential insecurity — the proliferation of 'for sale' signs." Jung, *Control of Panic Selling by Regulation of "For Sale" Signs*, 10 Urban Law Annual 322, 324-328 (1975).

See also *Brown v. State Realty Co.*, 304 F.Supp. 1236, 1237-1238 (ND Ga. 1969) for judicial factual findings that the existence of "for sale" and "sold" signs contribute to panic selling.

The Willingboro ordinance prohibits demonstrable tools of the blockbuster and causes of panic selling. Accordingly, the evil is not an "undifferentiated fear or apprehension", *Tinker v. Des Moines*, 393 US 503, 508 (1969). The evil exists as an ugly fact of life which must not be ignored but combatted promptly and effectively.

That a panic situation had not come into fruition in Willingboro should not be in any manner conclusive. As the Court of Appeals below noted in this case, *Linmark Associates, Inc., supra*, 535 F2d at 799-800, the purpose of the ordinance was to nip the panic selling in the bud and it would be against the public interest to allow the deterioration to take place before it might be controlled.

In any event the record below amply supports the existence of a panic selling climate and the opinion of many witnesses at the trial was that the ordinance

lessened this psychological feeling throughout the community. See, for example, the testimony of Donald Evans at J.A. pp 162a-163a, William Kerns J.A. pp 191a-192a, Kevin Connally J.A. p 220a, Val Gladfelter J.A. p 234a, Alexander J.A. p 240a and Reverend Earnest Shaw Lyght J.A. p 250a. The judgment of the body closely attuned to local conditions and psychological situations should not be second guessed by the judiciary when the statute is otherwise constitutional.

Petitioners complain that the desired effect of the ordinance is accomplished by keeping the public ignorant and cites *Bigelow v. Virginia, supra*, for the proposition that such means are impermissible. (Brief for Petitioners, pp 14-15). This argument ignores the fact that the prohibition in this case is not total as was the advertising ban in *Bigelow*. Alternatives of gaining the information still exist (as Petitioners admit — Brief of Petitioners, p 24). The ordinance does not stop all channels of communication but does remove the panic element from the communicative and educative process. With the constant reminder of the signs, community residents are goaded into action and do not seek out alternative and more rational means of assessing the situation.

The evidence on the record as well as judicial history and the opinion of commentators supports the contention that panic selling is a major social evil and "for sale" and "sold" signs contribute to this social ill. In any event, so long as some rational and reasonable relation exists between the evil and the means sought to prevent it the enactment of the legislation is entitled to a presumption of validity. 6 McQuillin *Municipal Corporations, supra*, §24.09 *passim* pp 484-492. The language referring to

Congress in *Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582, 585 (D.C. 1971) aff'd *sub nom Capital Broadcasting Co. v. Kleindienst*, 405 US 1000 (1972) applies equally well to the Willingboro Township council:

> "Finally, Congress is entitled to a presumption 'that if any state of facts might be supposed that would support its action, those facts must be presumed to exist.' International Ass'n. of Machine and A. Workers v. National Mediation Board, 138 US App D.C. 96, 425 F2d 527, 540 (1970)."

b. The means adopted are sufficiently narrow and no adequate alternative means exist to control "For Sale" and "Sold" signs and their contribution to panic selling.

Assuming that the signs are a significant cause of panic selling there can be no question that banning the signs is the most narrow and effective manner of ensuring that they do not continue to have this effect while at the same time ensuring that not all real estate advertising or other forms of protected expression be curtailed by the statute.

Petitioners' suggestion (Brief for Petitioners pp 22-23) that the "fear psychology" of panic selling may be avoided by a program of education is overly optimistic. Even assuming that the Township had the means and resources to launch a massive educational campaign there is no guarantee that such a rational approach could eradicate what is essentially an irrational reaction. Moreover, such a program would undoubtedly consume a great deal of time, and before root causes could be

weeded out the damage would in probability have occurred. Finally, the basic weakness of any educational program is that its commands and directives are at best precatory. No means exist to enforce "good ideas" and such enforcement would be overly paternalistic in any event.

Neighborhood associations would be another approach to the problem but these associations have no enforcement powers and are limited solely to educative functions of dubious value.

Real estate licensing boards or real estate codes of ethics are often totally ineffective to control the action of realtors since membership is often voluntary and not a prerequisite to doing business. See Note *Blockbusting*, 59 Georgetown L.J. 170, 171-172 (1970). In any event, licensing boards and real estate associations will not apply to land speculators who will often prey on the panic sellers.

Human rights commissions have no enforcement powers and as Witherspoon notes in *Civil Rights Policy in the Federal System: Proposals for a Better Use of the Administrative Process*, 74 Yale L. J. 1171, 1191 (1965) complaints to human rights commissions are few and far between on account of lack of knowledge of the existence of these facilities, lack of confidence in the commissions, and general aloofness of such commissions.

Criminal penalties to control overt encouragement of panic selling and blockbusting are inadequate because of proof difficulties and lack of effective deterrence resulting from the fact that fines and penalties do not compare with the profits available to a person actively engaged in blockbusting or encouraging panic selling. Furthermore,

traditional anti-blockbusting statutes such as 42 USC §3604(e) prohibit only practices and patterns of illicit representations and typically do not prohibit "for sale" signs which independent of any overt blockbusting tactics may contribute to panic selling.

It is thus apparent that the prohibition of "for sale" and "sold" signs is the least expensive and most efficient and effective manner of removing a significant cause of panic selling. The present case is, therefore, distinguishable from *Nebraska Press Association v. Stuart*, ___ US ___, 49 LEd2d 683 (1976) in which the prior restraint was held invalid due in large part to the fact that adequate alternative means existed to control the problem and thus vindicate both competing interests.

3. The Governmental Interest Is Unrelated To The Suppression Of Free Expression.

The purpose of the ordinance is not to ban notice of the commercial transaction which a "for sale" sign proposes.[1] If this were the case the ordinance would have to restrict the other available means of advertising. Rather, the ordinance seeks to prohibit a commercial activity which in situations such as existed at the time of the passage of the Willingboro ordinance contributed to a fear psychology culminating in panic selling. *It is thus the noncommunicative impact of the sign which the ordinance seeks to prohibit*. It is not the message of the signs but their very presence which is symbolic to the viewer of the idea that something is wrong with the

---

[1] In this regard it is interesting to note that a "sold" sign proposes no transaction. It would be anomalous, however, to ban only "sold" signs since this would create the impression that the neighborhood was so undesirable that owners could not sell their homes.

community. True, as Petitioners suggest, homeowners may still obtain information regarding the real estate market by other means (Brief for Petitioners p 24) but in this regard the signs are similar to the broadcasting prohibited in *Kovacs v. Cooper*, 336 US 77 (1949) in that the viewers of the signs are captive to the presence of the signs. As the District Court noted in *Barrick Realty, supra*:

> "Many white residents desire to remain in changing neighborhoods provided they can be maintained on a stable integrated basis. The evils they fear most — crime, overcrowding, depressed property values and being left behind — need not come to pass if stability can be achieved. Steadily increasing number of 'for sale' signs tends, no less than overt blockbusting practices, to undermine any hope of such stability. Once this hope is lost and complete racial transformation appears inevitable, even those desiring to remain are virtually forced to sell. The challenged ordinance therefore removes a significant source of panic and selling pressure from those who wish to remain in a transitional neighborhood." 354 F. Supp. at 135.

The advertising message itself is not really the cause of concern but rather the presence and proliferation of signs giving rise to the appearance and belief of rapid turnover in the community. Thus, the prohibition is not directed to the content *per se* of the message.

4. Alternative Channels Of Communication Are Open To Petitioners.

It is apparent that an incidental restriction does occur on the commercial advertisement of real estate. By prohibiting the presence of the signs there can be no

other effect than the preclusion of that manner of commercial advertising. However, alternate avenues of communication such as newspaper advertisements, multiple listing services, and personal solicitation still exist. The fact that Petitioner Mellman testified that thirty (30%) percent of his inquiries were motivated by signs (Brief for Petitioner, p 27) cannot be converted into a contention that the banning of signs reduced his business by thirty (30%) percent. The restriction merely entails a little more effort by brokers and perhaps a time lag for sellers though no evidence was offered by Petitioners to this effect. Prospective buyers have more than adequate means of ascertaining what is available on the market through newspaper ads and brokerage listings which would not in the case of purchasers involve a contract. As to the general public it seems somewhat ludicrous to contend as Petitioners do (Brief for Petitioners, p 28) that in these days of high gasoline prices, driving around the entire town to see where the signs were would be cheaper or consume less time than consulting a broker or looking at the newspaper utilizing a map of the city.

On similar facts the Court of Appeals for the Seventh Circuit in *Barrick Realty, supra*, found that adequate alternative means existed. The court states:

> "Thus the ordinance does not make it unduly difficult to sell a house; it only makes it slightly more expensive to do so. Accordingly, the burden on property rights is small, and any effect on the right to travel is insignificant." 491 F2d at 164.

II.

THE GOVERNMENTAL INTEREST OUTWEIGHS PETITIONERS' ASSERTED FIRST AMENDMENT RIGHTS.

To determine the validity of a statute which restricts private rights this Court has in the past balanced the competing interests involved. *Rowan v. United States Post Office Department*, 397 US 728 (1970), *Bibb v. Navajo Freight Lines, Inc.*, 359 US 520 (1959), *NAACP v. Button*, 371 US 415 (1936). This Court in such a process has considered the same type of factors viewed in time, place, manner restriction cases, e.g. *Pell v. Procunier*, 417 US 817, 826-835 (1974).

In First Amendment cases in which this approach has been adopted this Court has been especially rigorous in requiring that the state act with "precision of regulation", *NAACP v. Button*, 371 US 415, 438, so as to ensure that personal rights and liberties are not stifled by overbroad laws. The present case, however, involves a very narrow proscription: only one type of commercial advertising is prohibited.

The forum of the free speech is a private property owner's front yard, the mode is a sign and the message either a proposal of a commercial transaction or a one word indication that one has taken place. Balanced against this private interest is a governmental interest in the prevention of "fear psychology" that may trigger a panic selling situation and consequent deterioration of the community. Implicit in the balancing question is the matter of the deference courts owe to the legislative branch in the area of the exercise of police powers for the betterment of the community.

Although the case of *Breard v. Alexandria*, 341 US 622 (1951) may be somewhat tainted by its reliance on the commercial speech approach expressed in *Valentine v. Chrestensen*, 316 US 52 (1942), still its balancing question is analogous to the one faced in this case. In *Breard* this Court felt the right to privacy was more important than a publisher's right to sell his publications in a manner his solicitors thought best. Signs also have been prohibited for aesthetic reasons (23 USC §131, Highway Beautification Act), and due to the nature of the "services" offered by the legal and medical professions this Court suggests that their advertising may be regulated. *Virginia Pharmacy Board, supra*, ___ US ___, 48 LEd2d 346, 365, fn 25.

The nature of the advertising interest and of the governmental interest have been discussed in section I of the Argument portion of this Brief. Given the relative importance of the interests and given the fact that ample alternative means exist to "get the message across", a statute which incidentally restricts means of solicitation should be allowed to continue to further the substantial interest of the legislature and the people.

III.

THE WILLINGBORO ORDINANCE VIOLATES NEITHER THE EQUAL PROTECTION NOR THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

The goal of achieving racial stability is not, as Petitioners seem to argue, equivalent to discriminating against racial minorities (Brief for Petitioners *passim* pp 33 through 37). The evidence upon which Petitioners rely,

Township's Exhibit D-1 (Petition for Certiorari, Appendix A at 36; U.S.C.A. Joint Appendix at 128A; Brief for Petitioners p 35) does not support their contention. This exhibit shows merely that as of 1973 the Township of Willingboro was fairly well integrated and even if evidence had been offered to the effect that the pace of integration had been slowed, such evidence would be more reasonably construed to mean that stability was being achieved rather than that minorities were being excluded.

The statute at hand makes no unconstitutional classification on its face since it applies equally to all classes of persons. Unless the " . . . inevitable effect of a statute on its face may render it unconstitutional", *United States v. O'Brien*, 391 US at 384, legislative motive is not a proper reason for holding a statute unconstitutional. Petitioners have offered no evidence showing that the statute has an inevitable discriminatory effect and, therefore, Petitioners have failed to undermine the presumptive validity of this statute.

The cases cited by Petitioners at page 35 of Brief for Petitioners are inapposite due to the fact that each of these cases involved either a statutory scheme which on its face discriminated against a class of persons or did so by its inevitable effect. Contentions of discrimination in those cases were supported by allegations and evidence as to the discriminatory effect of the statutory scheme or regulation. No such discriminatory classification is apparent on the face of the Willingboro ordinance and beyond Petitioners' and the District Court's surmise and contention, no evidence is on the record of discrimination against any class of persons.

It would seem more logical to contend that homeowners or realtors were being denied equal protection of the laws by the Willingboro ordinance.

In this regard the general test was expressed by this Court in *Patsone v. Pennsylvania*, 232 US 138, 144 (1914) as follows:

> "But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out . . . ."

Homeowners and realtors place the "for sale" and "sold" signs. No other class of persons does so. Discouragement of panic selling is a proper legislative objective and the means sought to accomplish this end are reasonably and rationally related to it. The ordinance therefore satisfies equal protection standards. See: *Chicago Real Estate Board v. City of Chicago*, 36 Ill. 2d 530, 224 NE2d 793 (1967) upholding a classification singling out realtors.

In regard to due process claims it is well settled that a proper exercise of the police power is due process. See 6 McQuillin *Municipal Corporations*, *supra*, §24.28 pp 531-532. In determining whether an exercise of police power is proper the following test applies:

> " . . . the guarantee of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 US 502, 525 (1934).

See also *Village of Belle Terre v. Borass*, 416 US 1, 8 (1974). So expressed it is apparent that the due process test is less demanding than the justifications traditionally required by this Court to restrict First Amendment

freedoms. In view of the fact that this case does involve First Amendment claims it is apparent that if the ordinance withstands these First Amendment claims it will *a fortiori* withstand due process challenges. Conversely, if the ordinance falls to the First Amendment challenge, the due process claim becomes moot. Consequently, no detailed analysis of the due process test is necessary.

CONCLUSION

For the reasons stated, *Amicus Curiae*, City of Oak Park, Michigan, respectfully requests this Court to uphold the judgment of the Court of Appeals.

Respectfully submitted,

BURTON R. SHIFMAN, P.C.
BURTON R. SHIFMAN
PHILIP J. GOODMAN
DAVID M. BLACK
Attorneys for *Amicus Curiae*,
City of Oak Park, Michigan
1106 Travelers Tower
Southfield, Michigan 48076
(313) 358-0620

Dated: January 11, 1977

APPENDIX A

CITY OF OAK PARK
MICHIGAN

ORDINANCE NO. 0-73-24

An Ordinance to amend the code of Ordinances of the City of Oak Park by adding to Chapter 3, Advertising, Article I, New Section 3.4, and repealing section 5.12(b)(2)(d) of Appendix A, zoning, and repealing sections 36-103 through 36-105, Chapter 36, signs, for the purpose of regulating the use of signs in connection with single family dwellings and two-family dwellings.

The City of Oak Park Ordains:

Section 1. The Code of Ordinances of the City of Oak Park is hereby amended by adding a new Section 3.4 to Chapter 3, Advertising, Article I, which shall be designated as follows:

Section 3.4(a). It shall be unlawful for any person to construct, maintain, place, install or permit to be constructed, maintained, placed or installed any sign of any shape, size or form on property or buildings zoned for, used, occupied, built or constructed as single family or two-family dwellings.

For the purposes of this Section, the term "sign" is hereby defined to mean any structure, and all parts composing the same, together with frame, background or supports therefor, which are used for advertising or display purposes, or any

flags. bunting or material used for display or advertising purposes. including. but not limited to. placards. cards. structures or areas. posters and marquees of a temporary or permanent nature.

Section 3.4(b) – Exempt Signs. The foll›wing signs shall be exempt from the provisions of this Section:

(I) Signs advertising "garage sales" as permitted under Section 5.12(B)(2)(H)(IV) of this Chapter.

(II) The display of the American flag, the flag of the State of Michigan displayed at any time, or any other commemorative or national flag for display on holidays.

(III) Any sign or device not to exceed one sqare foot in area containing the street number, street name, name or names of occupants or a combination thereof.

(IV) Signs incident to those uses permissible on appeal under Section 5.13(1) where the Board of Zoning Appeals specifically finds that such signs would not be contrary to the spirit and intent of this ordinance.

(V) Any sign, not to exceed one (1) square foot in area, containing language of a nature which forbids trespassing, soliciting, dumping, walking on grass or picking flowers; or warning of dangerous conditions including, but not limited to, beware of dog or helping hand insignia for school children.

(VI) Any sign posted or placed by Order of any Municipal, County, State or Federal statutory authority or Court Order, or by any public utility.

Section 3.4(c). All signs as defined under this Section which were completely erected or in use on the effective date of this ordinance shall be exempt from the provisions for a period of ninety (90) days from the effective date of this ordinance, and thereafter shall be subject to its provisions.

Section 2. Sections 36-103 through 36-105 of Chapter 36 of the Code of Ordinances of the City of Oak Park, dealing with the location of signs in residential districts, are hereby repealed.

Section 3. Section 5.12(b)(2)(d) of Article IV, Appendix A of the Code of Ordinances of the City of Oak Park, dealing with the accessory use of non-illuminated signs, is hereby repealed.

Section 4. Should any Section, clause or paragraph be declared by any Court of competent jurisdiction to be invalid, the same will not affect the validity of the ordinance as a whole or a part thereof other than the part declared to be invalid.

Section 5. All ordinances in conflict with the provisions of this ordinance are, to the extent of such conflict, hereby repealed.

Section 6. This ordinance shall become effective ten (10) days from the date of its passage and shall be published as required by the Charter of the City of Oak Park.

Made, Passed and Adopted by the Council of the City of Oak Park on this 6th day of August, 1973.

Kathleen M. Callan, City Clerk
David H. Shepherd, Mayor

I. Kathleen M. Callan, duly authorized Clerk of the City of Oak Park, Michigan, do hereby certify that the foregoing ordinance was adopted by the Council of the City of Oak Park at its Regular Meeting on August 6, 1973.

/s/ Kathleen M. Callan
City Clerk

First reading: July 16, 1973

Second Reading: August 6, 1973

Adopted: August 6, 1973

Published: August 15, 1973

FOR ARGUMENT

Supreme Court, U. S.
FILED
FEB 7 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976

No. 76-357

LINMARK ASSOCIATES, INC. and
WILLIAM MELLMAN,
Petitioners,

vs

THE TOWNSHIP OF WILLINGBORO and
GERALD DALY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE HOUSING ADVOCATES, INC. AS AMICUS CURIAE

AVERY S. FRIEDMAN
DAVID L. HOEHNEN
EDWARD G. KRAMER
701 Citizens Building
Cleveland, Ohio 44114
(216) 579-0575
Counsel for Amicus Curiae
The Housing Advocates, Inc.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Table of Authorities II
Interest of Amicus Curiae 1
Brief of The Housing Advocates, Inc. As Amicus Curiae 5
Argument 5

I. Introduction 5
II. A National Policy Toward Securing a Racially Balanced and Integrated Society Supports Regulation of For-Sale-Sign Proliferation by Local Government 7
III. For-Sale-Sign Regulation Does Not Restrict Constitutionally Protected Speech 13
IV. For-Sale-Sign Proliferation Limitations Are an Essential Element in Maintaining Racial Balance 15

Conclusion 18

Acknowledgments for assistance are given to Cheryll Stewart and Amy Robertson, legal interns at The Housing Advocates, Inc.

TABLE OF AUTHORITIES

Cases

Austin Independent School District v. United States, 97 S. Ct. 517, 519 (1977) 5

Banks v. Perk, 341 F. Supp. 1175, 1185 (N.D. Ohio 1972), *aff'd in relevant part*, 473 F.2d 910 (6th Cir. 1973) 12

Barrick Realty v. City of Gary, 354 F. Supp. 126, 135-136 (N.D. Ind. 1973) 17

Barrick Realty v. City of Gary, 491 F.2d 161 (7th Cir. 1974) 16

Bigelow v. Commonwealth of Virginia, 421 U.S. 809 (1975) 14, 15

Boraas v. Village of Belle Terre, 416 U.S. 1 (1974) 6, 12

Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir. 1974), *cert. denied*, 95 S. Ct. 657 (1974) 11

Cornelius v. City of Parma, 374 F. Supp. 730 (N.D. Ohio 1974), *rev'd on other grounds*, 521 F.2d 1401 (6th Cir. 1975), *cert. denied*, 424 U.S. 996 (1976) 2, 8, 15

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 2, 12, 14

Fair Housing Council of Bergen County v. Eastern Bergen County Multiple Listing Service, P-H E.O.H. Rptr. ¶13,786, at 14,924 (D. N.J. 1976) 8-9

Gautreaux v. Chicago Housing Authority, 503 F.2d 930, 938 (7th Cir. 1974), *aff'd sub nom. Hills v. Gautreaux*, 425 U.S. 284 (1976) 8

Heights Community Congress v. Rosenblatt Realty, Inc., *Inc.*, P-H E.O.H. Rptr. ¶13,702 (N.D. Ohio 1975) ..2, 8, 18

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 11

Lane v. Wilson, 307 U.S. 268, 275 (1939) 11

Linmark Associates, Inc. v. Township of Willingboro, P-H E.O.H. Rptr. ¶13,754 (3rd Cir. 1976) 13, 14, 15

McGowan v. Maryland, 220 U.S. 420, 426 (1961) 6

Shapiro v. Thompson, 394 U.S. 618 (1969) 6

State of Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd* 371 U.S. 37 (1962) 11-12

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) 7, 8, 9, 10, 11, 17, 18

United States v. Bob Lawrence Realty, 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 414 U.S. 826 (1973), *reh. denied*, 414 U.S. 1087 (1973) 15

United States v. Hunter, 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972) 15

United States v. Mitchell, 327 F. Supp. 476 (N.D. Ga. 1971) 12

Valentine v. Chrestensen, 316 U.S. 52 (1942) 14

Village of Arlington Heights v. Metropolitan Housing Development Corp., No. 75-616, 42 U.S.L.W. 4073 (January 11, 1977) 12, 13

Village of Park Forest v. Fairfax Realty, P-H E.O.H. Rptr. ¶13,784, at 14,905 (N.D. Ill. 1976) 9

Weathers v. Peters Realty Corp., 499 F.2d 1197 (6th Cir. 1974) 2, 8

Zuch v. Hussey, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975) 17

Statutes

42 U.S.C. §3601 6

42 U.S.C. §3604 15

42 U.S.C. §3615 10

42 U.S.C. §§5301, *et seq.* 18

Miscellany

114 CONG. REC. H9559 (Daily Ed. April 10, 1968) 10

Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company*, 22 RUTGERS L. REV. 537, 551 (1968) 16

NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 225 (1968) 18

Supreme Court of the United States

October Term, 1976

No. 76-357

LINMARK ASSOCIATES, INC. and
WILLIAM MELLMAN,
Petitioners,

vs.

THE TOWNSHIP OF WILLINGBORO and
GERALD DALY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTEREST OF AMICUS CURIAE

Pursuant to Rules 42(2) and 42(3) of the Supreme Court of the United States, The Housing Advocates, Inc. written consent of the petitioners and respondents has been secured and consent letters are being forwarded to the Clerk of the Supreme Court.

The Housing Advocates, Inc. is a private non-profit, tax exempt corporation based in Cleveland, Ohio and organized under the laws of Ohio for the purpose of assisting in the achievement of equal housing opportunities. The

corporation maintains a board of prominent civic leaders and a staff of lawyers and planners involved in comprehensive planning, education, publication and enforcement efforts under the Federal Fair Housing Act. Staff lawyers have participated individually in significant local and national equal housing and zoning litigaton, both as counsel and as *amicus curiae*, including *Weathers v. Peters Realty Corp.*, 499 F.2d 1197 (6th Cir. 1974); *Cornelius v. City of Parma*, 374 F. Supp. 730 (N.D. Ohio 1974), *rev'd on other grounds*, 521 F.2d 1401 (6th Cir. 1975), *cert. denied*, 424 U.S. 996 (1976); *Heights Community Congress v. Rosenblatt Realty, Inc.*, P-H E.O.H. Rptr. ¶13,702 (N.D. Ohio 1975); *Construction Industries Association v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S.Ct. 1148 (1976) (*amicus curiae*); *Forest City Enterprises v. City of Eastlake*, 41 Ohio St. 2d 187 (1975) (*amicus curiae*), *rev'd*, 96 S.Ct. 2358 (1976); *Warner v. Perrino*, P-H E.O.H. Rptr. ¶13,717 (N.D. Ohio 1975); *Tokaji v. Toth*, P-H E.O.H. Rptr. ¶13,679 (N.D. Ohio 1974). Recent publications by staff include Friedman, *Federal Fair Housing Practice*, 20 A.L.I. PRAC. LAWYER 15 (December, 1974), *cited at* 11 HARV. CIV. RTS.-CIV. LIB. L. REV. at 138 (1976), and Kramer, *Promises, Promises: A New Day For Open Housing*, 21 N.Y. L. FORUM 537 (1976).

The Housing Advocates, Inc. predicates its interest on its experience in observing and addressing the factors directly related to combatting the ghettoization of racially transitional communities in the Greater Cleveland and other areas on behalf of community organizations. *Amicus curiae* has concluded that limitation of for-sale-sign proliferation, while concurrently permitting the use of other means to promote housing sales, has been a primary contributor to minimizing the resegregation of racially changing areas.

In support of its application for leave to file its brief *amicus curiae*, The Housing Advocates, Inc. provides legal representation to numbers of community organizations comprised of black and white citizens whose interests in the outcome of this litigation have not been adequately represented by the respondents nor by the petitioners. Among the citizens organizations supporting *amicus curiae* are Coventry Neighbors, Inc., Oxford Neighbors, and the Heights Community Congress, organizations of citizens whose priorities are geared to the interracial stability and harmony of their neighborhoods. While the respondents' brief will reflect a governmental perspective, the consideration of citizens' perspectives will be relevant to this Court's disposition of the case.

Accordingly, we respectfully urge this Court to affirm the action by the United States Court of Appeals for the Third Circuit in upholding the constitutionality of Willingboro's ordinance.

AVERY S. FRIEDMAN
DAVID L. HOEHNEN
EDWARD G. KRAMER
701 Citizens Building
Cleveland, Ohio 44114
(216) 579-0575
Attorneys for Amicus Curiae The Housing Advocates, Inc.

Supreme Court of the United States

October Term, 1976

No. 76-357

LINMARK ASSOCIATES, INC. and
WILLIAM MELLMAN,
Petitioners,

vs.

THE TOWNSHIP OF WILLINGBORO and
GERALD DALY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE HOUSING ADVOCATES, INC. AS AMICUS CURIAE

ARGUMENT

I. Introduction

This case tests the vitality of local governmental efforts to minimize racial imbalance. "The principal cause of racial and ethnic imbalance . . . across the country . . . is the imbalance of residential patterns." *Austin Independent School District v. United States*, 97 S. Ct. 517, 519 (1977).

The standard of judicial deference to local governmental decision-making has been an axiom established by this Court for over fifty years. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Boraas v. Village of Belle Terre*, 416 U.S. 1 (1974). The establishment of a rational basis for the enactment of an ordinance, in the absence of a showing of constitutional infringement, is sufficient in supporting its validity. *McGowan v. Maryland*, 220 U.S. 420, 426 (1961). If a right which can be classified as "fundamental" is shown, legislation will be struck down if unsupported by a compelling governmental interest. *Shapiro v. Thompson*, 394 U.S. 618 (1969). Willingboro's ordinance far exceeds a conventional rational basis. Its ordinance is not only designed to promote its interracial constituents' health, morals, welfare, safety and aesthetics, it is critical to them. Similar ordinances in other racially changing communities in America are likewise. Where local governmental action is exercised, the individual's right must give way to the particular concern of the community. *Belle Terre, supra.* The "particular concern" of Willingboro and of comparable communities is the perpetuation of a residential living scheme inherent in American democratic principles: balanced and integrated harmonious neighborhoods.

Black and white citizens in Willingboro and throughout the United States seek to maintain the emerging benefits of a national policy toward equal housing opportunities. Indeed, "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. §3601. The Housing Advocates, Inc., as *amicus curiae*, believes that Willingboro is achieving this policy within constitutional limitations.

II. A National Policy Toward Securing a Racially Balanced and Integrated Society Supports Regulation of For-Sale-Sign Proliferation by Local Government

This Court's seminal pronouncement in *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205 (1972) recognized with candor "[t]he enormity of the task of assuring fair housing" in America. This Court acknowledges that "HUD has no power of enforcement" and further that "[t]he role of the Attorney General [has been] minimal." *Id.* at 211. Indeed, this Court focused on the reality of making fair housing a reachable goal:

> It serves an important role in this part of the Civil Rights Act of 1968 in protecting not only those against whom a discrimination is directed but also those whose complaint . . . affects 'the very quality of their daily lives.' *Shannon v. Depart. of Housing & Urban Dev.*, 436 F.2d 89.

Yet, notwithstanding the difficulties inherent in fair housing enforcement, this Court proclaimed fair housing to be a "policy that Congress considered to be of the highest priority." *Id.* at 211.

While *Trafficante* dealt with racial discrimination alleged in a large apartment complex, its rationale has been applied in the challenge of housing bias in the public context:

> The Fair Housing Act is a comprehensive legislative effort designed to remedy a pressing social need. As recognized in *Trafficante*, Congress intended by its broad definition of 'persons aggrieved' in the Fair Housing Act, to enable all persons to redress injury to the right of interracial associations
>
> • • • • •

> Accordingly, it would not be an illogical extension of *Trafficante*, and well within its spirit, to rule that white residents of a city like Parma . . . could [also] challenge, under the Fair Housing Act, any purported racially exclusionary activity pursued by the City.

Cornelius v. City of Parma, 374 F. Supp. 730, 743 and 741 (N.D. Ohio 1974), *rev'd on other grounds*, 521 F.2d 1401 (6th Cir. 1975), *cert. denied*, 424 U.S. 996 (1976).

Perhaps more than in any metropolitan area in the United States, housing bias in the Greater Cleveland area has been characterized by one federal appeals court as "aggravated." *Gautreaux v. Chicago Housing Authority*, 503 F.2d 930, 938 (7th Cir. 1974), *aff'd sub nom. Hills v. Gautreaux*, 425 U.S. 284 (1976). The pressure on racially integrated Cleveland suburbs, such as Cleveland Heights, is particularly acute. Cf. *Weathers v. Peters Realty Corp.*, 499 F.2d 1197 (6th Cir. 1974) and has required the involvement of community organizations of black and white citizens challenging housing discrimination which interferes with their fundamental right of interracial associations. *Heights Community Congress v. Rosenblatt Realty, Inc.*, P-H E.O.H. Rptr. ¶13,702 (N.D. Ohio 1975). From the viewpoint of such citizen groups, we believe the coordinated effort to combat housing bias with the aid of local government through for-sale-sign proliferation regulation has helped to defuse the mounting pressures of racial resegregation in racially balanced neighborhoods.

In part because of this and consistent with the *Trafficante* rationale, it is not surprising that courts now uniformly provide a judicial forum to organizations of black and white citizens who seek to stem the ravages of racially discriminatory housing practices such as blockbusting and racial steering. In another New Jersey case, *Fair Housing*

Council of Bergen County v. Eastern Bergen County Multiple Listing Service, P-H E.O.H. Rptr. ¶13,786, at 14,924 (D. N.J. 1976), the court wrote:

> The Fair Housing Council may, however, establish standing as the representative of those of its [black and white] members who have been injured in fact. . . . In this case, the interests of the organization and the individual plaintiffs are not only sufficiently close, they coincide. Both seek to be free from discriminatory practices by multiple listing services and real estate brokers.

The evolution of the racially transitional community itself as a fair housing advocate has now become necessary to insure that the objectives of a policy toward equal housing opportunities can be met. Recently, one court granted standing to two suburban Chicago cities seeking to challenge alleged racially resegregative conduct by realty firms. The *Trafficante* logic directed recognition that the communities themselves have evolved as "persons aggrieved" in attempting to maintain racial stability:

> The Village of Park Forest and Park Forest South are bringing this action on their own behalf and on behalf of their residents. They charge the defendants with illegally manipulating the housing market to the 'economic and social detriment of their citizens.' They further allege that because of defendants' practices their residents 'have been and will be deprived of social and professional benefits of living in an integrated society.'

Village of Park Forest v. Fairfax Realty, P-H E.O.H. Rptr. ¶13,784, at 14,905 (N.D. Ill. 1976).

Scrutiny of the Congressional history of the Fair Housing Act which dictates our nation's commitment to combat segregated housing lends support to the argument that local efforts standing alone cannot solve the pervasiveness of housing bias. Without a comprehensive federal fair housing law, argued House Judiciary Chairman Emmanuel Celler, a network of state and local equal housing laws was simply not enough.

> [T]oday, some 22 number of municipalities have enacted fair housing laws prohibiting discrimination in private housing transactions, but nevertheless, it is plain that the *combined* efforts of State and local laws, Executive orders, as well as actions by private volunteer groups is just not enough. Court decisions are not enough. Federal legislation to eliminate the blight of segregated housing and the pale of the ghetto is demanded. [Emphasis added].

114 CONG. REC. H9559 (Daily Ed. April 10, 1968) Chairman Celler's comment during the debate of Title VIII of the Civil Rights Act of 1968, the fair housing provision, expressed a sensitivity to the necessity of strong laws, both national and local, in seeking to secure an end to racial discrimination in housing. Section 815 of the Fair Housing Act, 42 U.S.C. §3615, provides that the Act will not limit or invalidate local efforts to maintain equal housing opportunity. Indeed, taken in light of the high priority Congress has placed on fair housing, *Trafficante, supra* at 211, local fair housing ordinances such as Willingboro's anti-for-sale-sign proliferation regulation, represent a canny method for local government to insure "truly balanced and integrated living patterns" *Trafficante, supra* at 211.

Local government's interest in fair housing objectives on behalf of its black and white citizens who live together

in harmony is a compelling one. It has been the communities themselves that have encouraged their own interracial stability. Exploitation by certain real estate interests is an overwhelming burden. Local efforts are essential to counteract the irresponsible and unlawful efforts of certain realty interests in inciting fear to accelerate listings through for-sale-sign proliferation. Willingboro's experience typifies other "open" suburbs which, by virtue of the exclusion of minorities by sister suburbs, have experienced rapid resegregation. From 1960 to 1973, Willingboro's white population increased only by three times; its black population increased over twelve hundred times.

Be it by direct segregative discrimination or by resegregative for-sale-sign proliferation, the factor igniting the result is race. "[W]hen racial discrimination herds men into ghettos . . . , then it too is a relic of slavery." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968). To guard against the recreation of a ghetto, sign proliferation regulation is critical because "[t]here is no difference in results between the traditional type of discrimination [or] exploitation of a discriminatory situation." *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 330 (7th Cir. 1974).

Under no circumstances other than in an exploitative market where actual choice is unavailable can such an unnatural and disproportionately racial occurrence prevail. The city may regulate "sophisticated as well as simple minded [devices of resegregation]." Cf. *Lane v. Wilson*, 307 U.S. 268, 275 (1939). Indeed, racial statistics tell the story of Willingboro and other racially transitional communities whose citizens seek to maintain the interracial associational rights and "integrated living patterns" which this Court in *Trafficante* found significant. As this Court has emphasized: "In cases of racial discrimination, statistics often tell much and courts listen." *State of Alabama v.*

United States, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd* 371 U.S. 37 (1962). Willingboro's ordinance serves much of the purpose which the Act intends: prohibiting subtle behavior which can predictably result in racial resegregation. Cf. *United States v. Mitchell*, 327 F. Supp. 476 (N.D. Ga. 1971). *Mitchell* recognized that conduct which would be likely to convey to a reasonable man under the circumstances the idea that members of a particular race or color are or may be entering his neighborhood was unlawful. *Mitchell, supra* at 479. For-sale-sign proliferation in racially transitional communities does precisely that.

To take the next logical step, cities which are easy prey to some real estate interests, which thrive upon the segregative impact caused by for-sale-sign proliferation and "white flight" in order to secure listings, cannot sit idly by. Where, as in Willingboro, previous pervasive housing bias is much a part of its historical development, "[i]t is the *obligation* of the City to . . . aid in the integration of the housing patterns of the City *with all its strength*." *Banks v. Perk*, 341 F. Supp. 1175, 1185 (N.D. Ohio 1972), *aff'd in relevant part*, 473 F.2d 910 (6th Cir. 1973) [Emphasis added].

This Court's most recent pronouncement concerning standards to be employed in gauging equal housing opportunities may yet reflect how municipal conduct within the scope of the Fair Housing Act will be treated. In rejecting the sale discriminatory impact doctrine of the United States Court of Appeals for the Seventh Circuit in a constitutional challenge of a municipality's zoning practices, this Court concluded judicial deference should once again be exercised. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, No. 75-616, 42 U.S.L.W. 4073, 4076 (January 11, 1977). See generally *Euclid v. Ambler Realty, supra; Boraas v. Village of Belle Terre, supra*. Yet, however rational or considered the action by the village may

have been, this Court remanded the action to have the appeals court further consider whether or not, implicitly by discriminatory effect or otherwise, the zoning practices of the village violated various sections of the Fair Housing Act, *Arlington Heights, supra* at 4078.

By this standard, Willingboro's failure to preserve its interracially balanced character, permitting, by non-action, the resegregation by for-sale-sign proliferation, may in fact alone place the township in a posture of obstructing the very goal which the Fair Housing Act dictates and which the township itself seeks to attain. It is the interracially harmonious citizenry that pay the price of sign proliferation and ultimate resegregation.

III. For-Sale-Sign Regulation Does Not Restrict Constitutionally Protected Speech

While the petitioners, a realtor and property developer, portray their plight as one of an infringement of constitutionally protected speech, the Court of Appeals more accurately identified the realities and put the challenge in context:

> The interest of both the black and white citizens in stable communities outweighs any minor inconvenience of having to utilize alternative methods for advertisement and information gathering.

Linmark Associates, Inc. v. Township of Willingboro, P-H E.O.H. Rptr. ¶13,754, at 14,757 (3rd Cir. 1976). Rather than "expression" in its constitutional sense, petitioners have been using and continue to use a panoply of marketing devices. Indeed, the broker-petitioner conceded that most of his business, 70%, is secured by means other than by signs. Petitioner has, for example, effectively used newspapers, the limitation of which was of great concern to this

Court in *Bigelow v. Commonwealth of Viginia*, 421 U.S. 809 (1975). The utilization of newspapers by the petitioner was much like the attempted utilization which the petitioner in *Bigelow* sought to secure. Unlike *Bigelow*, however, this petitioner seeks to go beyond newspaper use, which is unlimited here, and claims that another sales device, signs in Willingboro's interracially sensitive boundaries, is additional "speech" protected under the First Amendment.

An examination of *Bigelow* suggests the opposite. "For sale" signs are purely commercial speech and convey information of interest only to a limited number of persons. Particularly coupled with the other solicitation devices employed by the petitioner, the purely commercial nature of the for-sale signs becomes abundantly apparent. A for-sale sign has only one purpose when used in a legitimate manner: to solicit and entice potential buyers. It does not do "[m]ore than simply propose a commercial transaction." *Bigelow*, *supra* at 821.

Unlike the newspaper advertisement for abortions protected in *Bigelow*, a for-sale sign does not contain "factual material of clear 'public interest'." *Id.* at 21. Also unlike *Bigelow*, a for-sale sign conveys information of possible interest only to potential buyers; it does not convey "information of potential interest and value to a diverse audience. . . ." *Id.* at 821. Neither does it convey opinion nor ideas. It is bare commercial solicitation and cannot be elevated to the constitutional protection afforded under the First Amendment. *Valentine v. Chretensen*, 316 U.S. 52 (1942). While *amicus curiae* concurs with the Court of Appeals below, Chief Judge Markey expressed it more graphically in characterizing petitioners' "[e]xaltation of . . . commercial . . . transactions, by equating them to the to the majestic status of the First Amendment." *Linmark Associates*, *supra* at 14,751.

It is noteworthy that the efforts to pursue for-sale-sign proliferation are often focused in racially changing areas where racial fears prevail and real estate agents converge like "[f]lies to a leaking jar of honey." *United States v. Bob Lawrence Realty*, 474 F.2d 115, 124, n.13 (5th Cir. 1973). *Bob Lawrence* upheld the constitutionality of the anti-blockbusting and anti-steering provisions of the Fair Housing Act, §804(e), 42 U.S.C. §3604(e) which bars sales of homes by racial inducement in the face of claims that such prohibitions obstructed First Amendment rights of a real estate company. Likewise in *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972), racial advertising proscriptions were held permissible and not violative of First Amendment rights. The Court of Appeals for the Fourth Circuit held that banning racially discriminatory advertising under §804(c) of the Fair Housing Act, 42 U.S.C. 3604(c), interfered with no constitutionally protected "speech."

Bigelow addressed the imposition placed on newspapers. Impairing the proper function of a newspaper smacks of First Amendment infirmities. Aiding a real estate firm to increase purely commercial activity in the exploitation of a racially sensitive market is not remotely comparable. Beyond that, such an "[a]rgument ignores current realities of racial psychology and economic practicalities." *Clark v. Universal Builders, Inc.*, *supra* at 331.

IV. For-Sale-Sign Proliferation Limitations Are an Essential Element in Maintaining Racial Balance

It is well within Willingboro's police power to address itself to the "pressing social need" of a balanced and integrated community. Cf. *Cornelius v. City of Parma*, *supra* at 743.

> The right to open housing means more than the right to move from an old ghetto to a new ghetto. Rather, the goal of our national housing policy is to 'replace the ghettos' with 'truly integrated and balanced living patterns' for persons of all races. Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211. It is clearly consistent with the Constitution and federal housing policy for [the City of] Gary to pursue a policy of encouraging stable integrated neighborhoods and discouraging brief integration followed by prompt resegregation. . . .

Barrick Realty v. City of Gary, 491 F.2d 161 (7th Cir. 1974). While the City of Gary's sign proliferation regulation occurred at a time where the city was experiencing heavy resegregation, Willingboro's telling statistics of minority change from less than 1% to over 18% within thirteen years dictated an awareness of Gary's experience, but at the early stage. Many transitional, sensitive communities like Willingboro seek to stem the tragedy of ghettoization and preserve the precious American objectives of harmonious interracial living.

As one commentator suggests:

> If ghettoization of America's black citizens is a 'relic' of the slave system, then a compelling affirmative duty lies upon *all levels of government* to take measures to secure its *prompt eradication*.

Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company*, 22 RUTGERS L. REV. 537, 551 (1968).

Black and white citizens in Willingboro, Cleveland Heights, Shaker Heights and other successful, harmonious communities believe sign-proliferation regulation is vital

to their future as models for American living. In terms of their government's role:

> [T]he prohibition of for sale signs [is] no less rationally related to [combatting resegregation], or to the ultimate objective of integration and social and economic stability than the prohibition of blockbusting activities.

Barrick Realty v. City of Gary, 354 F. Supp. 126, 135-136 (N.D. Ind. 1973). For-sale-sign proliferation has but a single message in racially changing areas: panic-pedalling. It causes instability which is bred on rumor, fear and hostility. Proliferation becomes another racial factor which influences choice. Where signs abound in such communities, the "freedom" to live in a balanced and integrated neighborhood is denied. Sign proliferation triggers an irreversible pattern of resegregation and of ghettoization:

> Where choice influencing factors such as race are not eliminated, freedom of choice in the purchase of real estate becomes a fantasy. . . .

Zuch v. Hussey, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975).

It cannot remain the role of community organizations alone, as the progeny of *Trafficante*, to become the predominant element in the battle to achieve balanced and integrated housing conditions. As the Chief Judge of the United States District Court for the Northern District of Ohio wrote, relying on *Trafficante*:

> Plaintiff Heights Community Congress claims that it has been damaged in that 'the conduct of the [real estate firm] directly obstructs, frustrates and damages the congress in achieving its objective by impeding the processes which are used to benefit the entire community of Cleveland Heights. . . .'

Heights Community Congress v. Rosenblatt Realty, Inc., P-H E.O.H. Rptr. ¶13,702, at 14,475 (N.D. Ohio 1975).

This nation is unquestionably committed to fair housing as a fundamental element of a federalistic approach to housing and community development. See 42 U.S.C. §§5301, *et seq.* The role of local government, coupled with an active role of the United States and, significantly, white and black community groups vanguarding fair housing enforcement, is a paramount undertaking without which the predictions by the Kerner Commission may one day hold true: a nation racially divided into two nations, one black and one white. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 225 (1968). As residents in such communities, citizens themselves will bear the consequences of the benefits of an integrated society, *Trafficante, supra* at 208, or the ravages of a resegregated ghetto. The for-sale-sign proliferation regulation is a significant method in achieving the beneficial society which the Congress envisioned in the enactment of Title VIII and which this Court so lucidly recognized in *Trafficante.*

CONCLUSION

For the foregoing reasons, *amicus curiae* The Housing Advocates, Inc. urges this Court to affirm the holding of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

AVERY S. FRIEDMAN
DAVID L. HOEHNEN
EDWARD G. KRAMER
701 Citizens Building
Cleveland, Ohio 44114
(216) 579-0575
Counsel for Amicus Curiae
The Housing Advocates, Inc.